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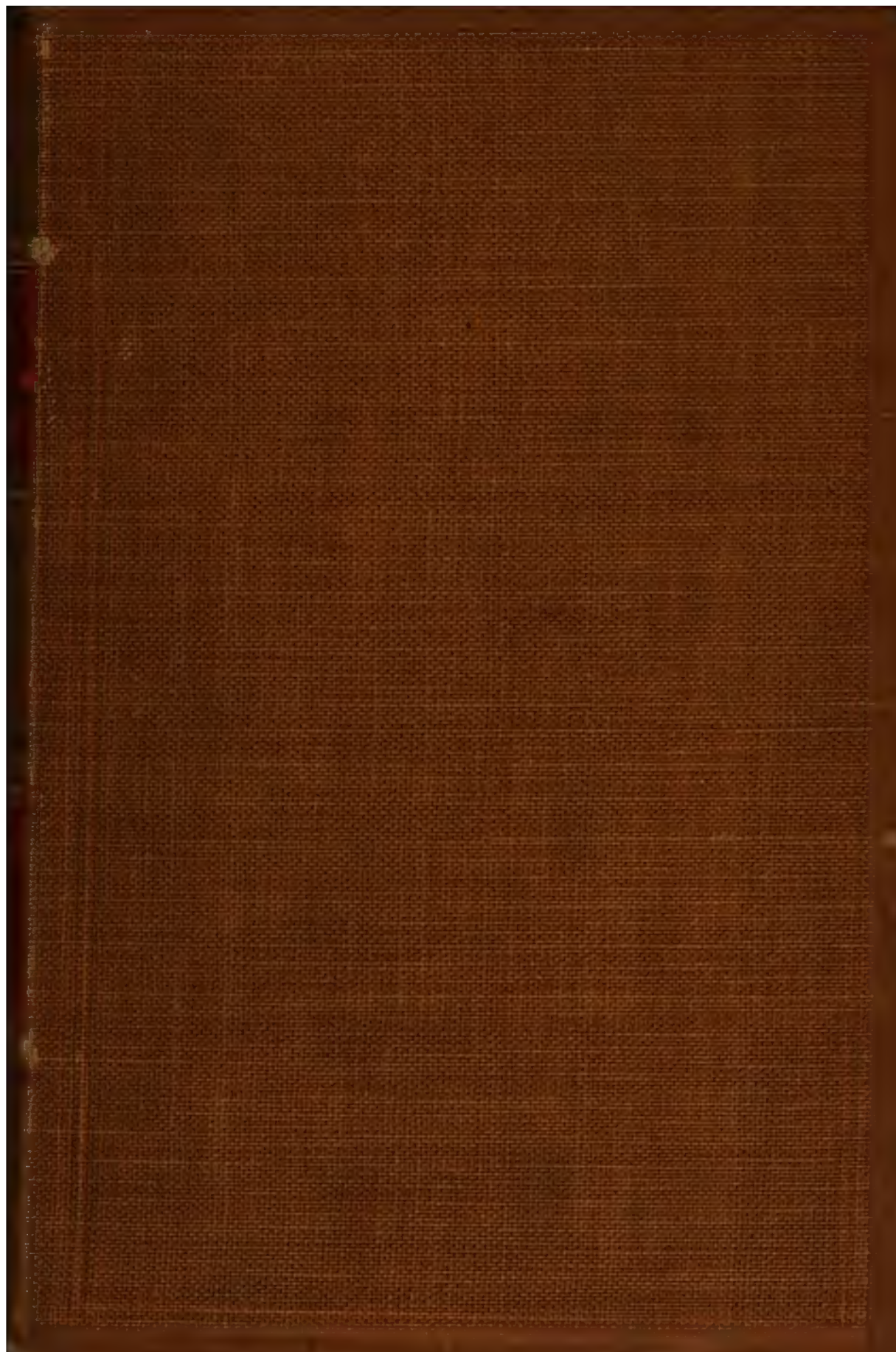
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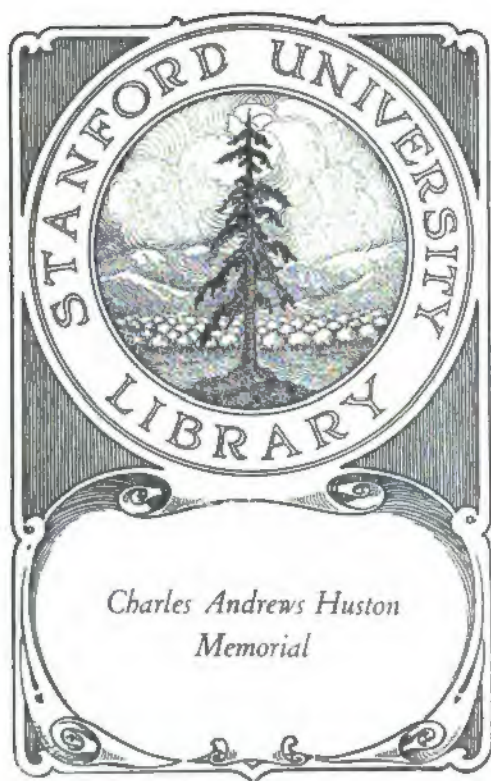
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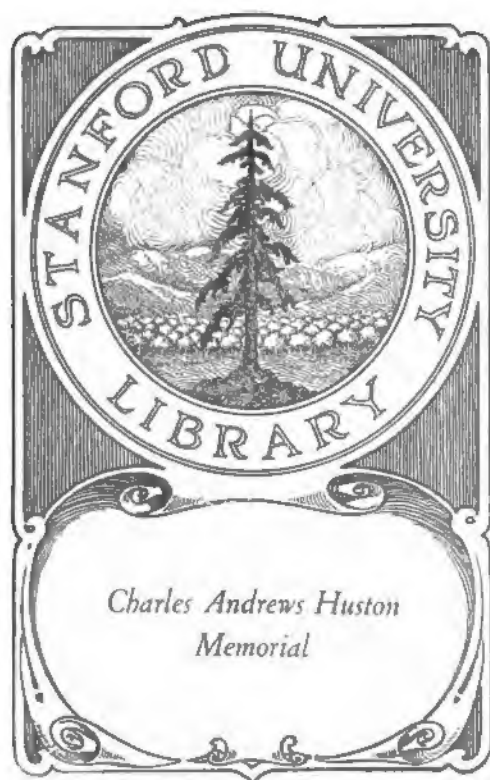
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THE PRINCIPLES
OF THE LAW OF
PUBLIC CORPORATIONS

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TO THE
HON. ROBERT G. EVANS,
OF MINNESOTA,
THIS VOLUME IS CORDIALLY AND RESPECTFULLY
DEDICATED.

PREFACE TO REVISED EDITION

In preparing this edition, the main endeavor has been to make a complete revision and rearrangement of the book, and such substitutions and additions as appeared likely to improve it for the use of students. In a field of law in which the views of judges vary so much, it is natural that writers should differ as to the truth of generalizations and the correctness of statements; but doubtless many of the changes in the book are such as the author himself would have made, had the pressure of professional labors left him free to undertake the revision.

Some parts of the text have been entirely replaced by new chapters and sections, treating the matter differently. Among these are the chapters on The Creation of Corporations and Streets and Highways, which are entirely new; and those on Power to Contract and Own Property, and Delegation and Restriction of Power and Alienation of Property, in each of which some of the original text has been utilized. The note after section 11 on the Forms of City Government, and among others sections 47, 69, 70, 89, 93, 176 to 179, 183, 195 to 200, 254, 255, are new. For various paragraphs and parts of paragraphs, the reviser should also assume responsibility, but they cannot well be specified.

In revising the text, many alterations have been made by changes in expression; and sentences and clauses have been omitted or added as seemed necessary to secure greater accuracy and smoothness or clearer elucidation. The notes have been enlarged, old citations verified, and references to the Reporter System inserted.

The order of arrangement has been radically changed, to correspond to the order which has seemed most desirable in view of the experience of some who are engaged in presenting the subject at law schools.

The kindness is here acknowledged of Robert D. Petty, Esq., of New York, in sending his notes made while using the book in connection with his lectures at New York Law School.

JOHN E. MACY.

BOSTON, *Jan. 1910.*

PREFACE TO FIRST EDITION.

This book is the result of an attempt to state the law of Public Corporations in a manner suited to the needs of students. The plan made it necessary to pass rapidly over questions which are no longer controverted, and to treat very briefly matters which more properly belong to other titles of the law. A writer on this subject must necessarily be under unmeasured obligation to the Hon. John F. Dillon. I gladly acknowledge that obligation.

The authorities have been verified and the table of cases prepared by W. E. Hewett, Esq., of the Minneapolis bar.

MINNEAPOLIS, *April*, 1898.

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PUBLIC CORPORATIONS.

CHAPTER I.

DEFINITION, CLASSIFICATION AND HISTORY.

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| <p>§ 1. In general.</p> <p>2. Different kinds of corporations.</p> <p>3. Classification of public corporations.</p> <p>4. School districts.</p> <p>5. Distribution of powers and duties.</p> | <p>§ 6. The county—its organization and functions.</p> <p>7. The township.</p> <p>8. The town meeting.</p> <p>9. The township elsewhere than in New England.</p> <p>10. The English municipality.</p> <p>11. The American municipality.</p> |
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§ 1. In general.—The people residing within the territorial limits of a state constitute a public body, organized for the purpose of self-government. The powers of state government are distributed by constitutions among three main departments—legislative, executive and judicial—which take their names from the nature of the powers conferred upon them respectively. To the legislative department belongs the power, as incidental to the making of laws, to constitute the subordinate agencies that must be authorized to execute them, except as such agencies may have been provided by the constitution itself. Consequently it establishes public officers, boards, commissions and tribunals—often with corporate powers—and invests them with administrative duties. It also subdivides the territory of the state, and forms the people who reside within the subdivisions into corporations charged with the execution of specified functions of government within their respective sections. The condition of congested, urban communities demands, as it has demanded throughout the ages past, a still broader delegation of administrative authority. The problems of such communities are so peculiar to themselves, and the greater part of their concerns are so purely local, that the legislature creates them into autonomous corporations, and clothes them with general powers of local self-government, and with many special privileges for the

supplying of the separate needs of their own inhabitants. They differ from the ordinary territorial subdivisions chiefly in the possession of these special powers and privileges, granted for the benefit of the people of the locality, as distinguished from the people of the state at large of which they form a part. Many of these latter bodies are very old and have grown out of conditions which have long since passed away. The state has confirmed their ancient privileges, and in addition has imposed upon them many duties in connection with the work of public administration. Many public corporations in this country are provided for in the constitution of the state. Some are directly established by constitution. Ordinarily, they are inseparably connected with a portion of the territory of the state; but the state may, and often does, create corporations for public purposes, without reference to territory.

§ 2. Different kinds of corporations.—The state creates these corporations for its own purposes; it may do so without reference to the wishes of the people who reside within the territory. It also grants to individuals the right or franchise of being a corporation for the purpose of advancing their private purposes. The difference between the two kinds of corporations is apparent. The one is public, the other private. The former may be created by the state on its own initiative, and is created to aid in the work of public administration and the government of the people. The latter the state consents to or authorizes for the purpose of enabling individuals to conduct more advantageously their own business. Both are corporations because both are legal entities or artificial persons endowed with certain legal powers; but they have different objects, and are possessed of different powers. Private corporations are the result of contract; but public corporations are involuntary, and there is no contractual relation between the members or between the members and the state.¹

If the corporation was created primarily to advance the per-

¹ *Dean v. Davis*, 51 Cal. 406; *People v. Morris*, 13 Wend. 325, 327; *Bennett's Appeal*, 65 Pa. St. 242. The supreme court of New Jersey in *Ten Eyck v. Canal Co.*, 18 N. J. L. 200, at 203 said: "Public corporations are political corporations, or such as are founded wholly for public purposes, and the whole interest in which is in the public. The fact of the public having an interest in the works or the property or the object of a corporation does not make it a public corpora-

sonal interests of private persons by enabling them more effectually to appropriate their property or direct their energies to the accomplishing of some design of their own, it is a private corporation, even though the undertaking be one which the state itself might enter upon. Most universities are private corporations, but education is a work which the state also may and does perform through corporations of its own. Often a free hospital or other charitable institution is a private corporation, but the state may and does establish institutions of its own for similar purposes.

It is not always sufficient to identify such a corporation as being the state's own creature that the state has granted it property, or has assisted it by taxation or out of the public funds. A university may be a private corporation, though endowed by the state.² On the other hand it does not invariably prevent the corporation from being the state's own creature that it has been endowed, or is supported, by private persons.³ A university may be a public corporation, even though endowed with donations from private hands; and many public corporations are authorized to administer trusts created by private persons for public benefit. It follows that the fact that the state has an interest in a corporation does not necessarily make the corporation a public one.⁴ It follows also that the fact that some private property interests are involved in the corporation does not necessarily render the corporation a private one. Evidently the criterion to determine the nature of the corporation is not the nature of the undertaking⁵ or the source of its support,⁶ but *the relation of the body to the state.*⁷ This may

tion. All corporations, whether public or private, are, in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is, in the eye of the law, designed for public benefit. A turnpike or a canal company is a private company, yet the public have an interest in the use of their works, subject to such tolls and restrictions as the charter has imposed. The interest, therefore, which the public may have in the

property or in the objects of a corporation, whether direct or incidental (unless it has the whole interest), does not determine its character as a public or private incorporation." Approved, *Hanson v. Vernon*, 27 Iowa, 28, 53.

² *Allen v. McKeen*, 1 Sumner 276.

³ *Head v. Curators*, 47 Mo. 220.

⁴ *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904.

⁵ *Thompson v. Pacific R. Co.*, 9 Wall. (U. S.) 579.

⁶ *Cleveland v. Stewart*, 3 Ga. 283.

⁷ See *Beach, Pub. Corp.*, § 3.

depend upon implied legislative intent. To create a public corporation it must appear that the intent of the legislature in granting the incorporation is to create an official agency of government. Such organizations as cities, towns, villages, counties and townships are typical public corporations; others are state universities, incorporated boards of commissioners, trustees of a county asylum, or of a municipal hospital or library.

An attempt has been made to create a third class of corporations under the name of *quasi*-public corporations, and to include therein such as are organized primarily for the benefit of the members, but are engaged in enterprises in which the public interests are directly involved, such as railway and warehouse companies.⁸ But there it is the use and not the corporation which is of a public nature. And it is an old principle of the law that, when "private property is affected with a public interest, it ceases to be *juris privati* only;"⁹ or, as stated in a modern decision, when a person devotes his property "to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."¹⁰

Corporations which have received aid from the government for public purposes are sometimes classed as public corporations, but they are private corporations charged with public duties; and, in order that they may properly perform such duties, the state grants to them certain privileges and exemptions. Thus, the property of such a corporation which is necessary to enable it to perform the public duties with which it

Dartmouth College v. Woodward, (N. Y.), 531; Directors v. Houston, 4 Wheat. 518, 668; Rundle v. Delaware, etc. Canal, 1 Wall. Jr. 275-290; Vincennes University v. Indiana, 14 How. (U. S.) 268; Bank of United States v. Planters' Bank, 9 Wheat. (U. S.) 907; Bonaparte v. Camden, etc. R. Co., 1 Bald. 205; Alabama R. Co. v. Kidd, 29 Ala. 221; In re New York, etc. R. Co. v. Metropolitan Gaslight Co., 63 N. Y. 326; Bailey v. Mayor, 3 Hill

(N. Y.), 531; Directors v. Houston, 71 Ill. 318; Miners' Bank v. United States, 1 Greene (Iowa), 553; State Bank v. Gibbs, 3 McCord (S. C.), 377. See Andrews, American Law, § 371.

⁸ Miners' Ditch Co. v. Zellerbach, 37 Cal. 543.

⁹ Lord Hale in *De Portibus Maris*, 1 Hargrave's Law Tracts, 78.

¹⁰ Munn v. Illinois, 94 U. S. 113. This is the doctrine of the

is charged cannot be seized and sold to satisfy an ordinary judgment.¹¹ Such bodies are what the supreme court of California¹² has designated as “corporations technically private, but of a *quasi*-public character, having in view some public enterprise in which the public interests are involved.”

§ 3. Classification of public corporations.—Public corporations fall into two classes: The first are known as municipal corporations, and what remains may for want of a better name be grouped under the head of public *quasi*-corporations. Distinguishing features of municipal corporations are the possession of certain powers of legislation, and of certain powers and privileges which are to be exercised for the particular benefit of the inhabitants of the municipality.

The corporation includes both the territory and the inhabitants residing therein;¹³ and may be defined as “the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns.”¹⁴

“Granger Cases” and “Railroad Commission Cases.” Chicago, etc. R. Co. v. Iowa, 94 U. S. 155 (1876); Peik v. Chicago, etc., R. Co., 94 U. S. 164, 178; Railroad Commission Cases, 116 U. S. 307 (1886); Hockett v. State, 105 Ind. 250 (tel. co.); State v. Ironton Gas Co., 37 Ohio St. 45 (gas and water cos.); Spring Valley Water Works v. Schottler, 110 U. S. 347, 354.

A distinction may be made, however, between *quasi*-public corporations strictly, such as railroad, turnpike and canal companies, and those corporations in which the public is interested only because of the public service which they render, such as warehouse, elevator and express companies. The former not only devote their property to a public service, but perform a duty which is within the object of government, as defined by usage, and perform that duty

for the state, with the assistance of sovereign powers—the power of eminent domain and sometimes that of taxation.

¹¹ Overton Bridge Co. v. Means, 33 Neb. 857, 51 N. W. Rep. 240, 29 Am. St. Rep. 514; Gooch v. McGee, 83 N. C. 59; Baxter v. Turnpike Co., 10 Lea (Tenn.), 488; Water Co. v. Hamilton, 81 Ky. 517; Palestine v. Barnes, 50 Tex. 538; Gue v. Canal Co., 24 How. (U. S.) 257; Seymour v. Turnpike Co., 10 Ohio, 476; Foster v. Fowler, 60 Pa. St. 27. See *infra*, “Alienation of Property.”

¹² Miners’ Ditch Co. v. Zellerbach, 37 Cal. 543.

¹³ Kelly v. Pittsburgh, 104 U. S. 78; Galesburg v. Hawkinson, 75 Ill. 156; People v. Bennett, 29 Mich. 451; Lowber v. Mayor, 5 Abb. Pr. (N. Y.) 325; Clarke v. Rochester, 24 Barb. (N. Y.) 446.

¹⁴ 1 Dillon, Mun. Corp., § 20. The fundamental idea of a municipal

The word "municipal" is sometimes used in statutes as synonymous with public and political, thus including all the governmental subdivisions of the state. Thus, counties have been held to be "municipal corporations" within the intent of the provisions of certain statutes,¹⁵ although they are not properly municipal corporations.¹⁶

corporation is "the investing of the people of a place with the local government thereof." *Cuddon v. Eastwick*, 1 Salk. 143. *People v. Morris*, 13 Wend. (N.Y.) 325. *People v. Hurlbut*, 24 Mich. 44; *State v. Milwaukee*, 20 Wis. 87; *Watertown v. Cady*, 20 Wis. 501; *Crane v. Fond du Lac*, 16 Wis. 196; *Norton v. Peck*, 3 Wis. 714. The words "city" and "village" refer only to municipal corporations. *City of Wahoo v. Reeder*, 27 Neb. 770, 43 N. W. 1145; *Mitchell v. Franklin Co.*, 25 Ohio St. 143. A school district or township is included within the phrase "political or municipal corporation." *Winspear v. Township of Holman*, 37 Iowa, 542; *Curry v. Township of Sioux City*, 62 Iowa, 104. See *School District v. Williams*, 38 Ark. 454. The "Board of Park Commissioners" of the city of Minneapolis is not a municipal corporation. *State v. District Court*, 33 Minn. 235. The city and county of San Francisco is a municipal corporation, to be regarded as a city in matters of government, but the territory over

which government is exercised is at the same time a county. *Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620. As to construction of the word "town," see *Glen Ridge v. Stout*, 58 N. J. L. 598, 35 Atl. 913.

¹⁵ *Iowa Land Co. v. Carroll*, 39 Iowa, 151; *Heller v. Stremmell*, 52 Mo. 309. In *Dowlan v. Sibley Co.*, 36 Minn. 430, the court, in considering the provision of the statute, "that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements, etc.," Dickinson, J., said: "The question now presented is whether the words 'municipal corporations,' as here employed, should be deemed to include counties. At the time of the adoption of this amendment, counties might with propriety be termed political corporations. The statute declared them to be such. Gen. Stat. 1866, ch. 8, sec. 75. They were not, however, in the proper and more general use of the term, *municipal* corporations. Yet, for the purposes of general des-

¹⁶ *People v. McFadden*, 81 Cal. 489; *Soper v. Henry Co.*, 26 Iowa, 264; *State v. Leffingwell*, 54 Mo. 458; *Barton Co. v. Walser*, 47 Mo. 189; *Board of Park Com'rs v. Common Council of Detroit*, 28 Mich. 237; *Green Co. v. Eubanks*, 80 Ala. 204; *Askew v. Hale Co.*, 54 Ala. 639; *Sherman Co. v. Simons*, 109

U. S. 735; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Williamsport v. Commonwealth*, 84 Pa. St. 487. *Woods v. Colfax County*, 10 Neb. 552; *Hamilton Co. v. Mighels*, 7 Ohio St. 109. The term "municipal corporation" does not include towns. *Eaton v. Supervisors of Manitowoc Co.*, 44 Wis. 489.

Under the head of public *quasi*-corporations are included those bodies which are public in their nature, but have not the general powers and liabilities of self-governing corporations. The term is used to include not only certain incorporations of the inhabitants of sections of territory, such as counties, townships and school districts, but also incorporations of boards or councils of public officers, such as overseers of the poor, a state board of park commissioners, a local board of education. In all these types the corporate functions are narrower, more specific, and more strictly public. Often the corporate capacity is granted merely for convenience in contracting, in handling property, and in suing and being sued.

Most of these *quasi*-corporations, so-called, are created to act purely as administrative agents of the state.

“They are created for a public purpose as an agency of state through which it can most conveniently and effectually discharge the duties of the state as an organized government to every person, and by which it can best promote the welfare of all.”¹⁷

ignation, it is not uncommon to use that term in a sense including such *quasi*-corporations as counties and towns, and so sometimes to distinguish public or political corporations or functions from those which would be termed private. Thus, in our own decisions may be found such language as this: ‘A municipal corporation,—a city, county or town’ (Harrington v. Town of Plainview, 27 Minn. 224, 229, 6 N. W. 777), ‘a county or any other municipal corporation,’ (County of Blue Earth v. St. Paul & Sioux City R. Co., 28 Minn. 503, 507, 11 N. W. 73). See, also, Winspear v. District Tp. of Holman, 37 Iowa, 542; Ex parte Selma & Gulf R. Co., 45 Ala. 696, 732. In considering a provision in the constitution of Missouri forbidding the creation of corporations by special acts, ‘except for municipal purposes,’ it was said that a corporation for municipal purposes is

either a municipality, such as a city or town created expressly for local self-government, with delegated legislative powers, or it might be a subdivision of the state for governmental purposes, such as a county. State v. Leffingwell, 54 Mo. 458, 475. * * * Our consideration of this question has led us to the conclusion that the words ‘municipal corporations’ in the proviso under consideration may be reasonably construed as having the broad rather than the restricted sense, and as including such *quasi*-corporations as counties and towns.”

¹⁷ Galveston v. Posnainsky, 62 Tex. 118; School District v. Wood, 13 Mass. 193. As used in our jurisprudence, the term “corporation” applies to derivative creations only, and does not include the state. Des Moines Co. v. Harker, 34 Iowa, 84. 1 Andrews, American Law, § 376.

The difference between an administrative agent of the state purely, and a municipal corporation, is set forth prominently in the distinction usually made between a county and a city or town. The distinction is thus drawn by Mr. Justice Paxson: "A municipal corporation has for its object the interest, advantage and convenience of the locality and its people. A county organization is intended to subserve the policy of the state at large in such matters as finance, education, provision for the poor, military organization, means of travel and transport, and especially the administration of justice. A municipal corporation is a government possessing powers of legislation, and is charged with a general care for the welfare of the people; while a county organization is merely the involuntary agent of the state, charged with the interests of the state in a particular county, and clothed with certain administrative functions limited in extent and clearly defined by law."¹⁸

§ 4. **School districts.**—The administrative area for educational purposes is a public corporation known as a school district. Such area is usually a territorial subdivision of the county or township, according to whether one or the other is the unit of local government. Like all such corporations, its powers are strictly limited to such as are necessary for the proper performance of the administrative duties with which it is charged. "These little corporations," says Mr. Justice Bell,¹⁹ "have sprung into existence within a few years * * * and their corporate powers and those of their officers are to be settled by the construction of the courts upon a succession of crude, unconnected, and often experimental enactments. * * * School districts are in New Hampshire *quasi*-corporations of the most limited powers known to the law. They have no powers derived from usage. * * * They have the powers expressly granted

¹⁸ *Williamsport v. Comm.*, 84 Pa. St. 487, at 499. "A county has some corporate characteristics, but it is not a municipal corporation, though often so termed. It is an original political or civil division of the state, created by constitutional authority or statute for the purpose of securing local suffrage and representation and also to aid in the administration of government. It is in its very nature, character and

purpose, public, a constituent element in the state, and a governmental agency or auxiliary, rather than a corporation. All the *governmental* powers with which county officers are intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state; * * * ." ¹ Andrews, *American Law*, § 377.

¹⁹ *Harris v. School District*, 28 N. H. 58.

to them, and such implied powers as are necessary to enable them to perform their duties, and no more.”²⁰ Like counties, school districts have been sometimes included within the general name, municipal corporations.²¹

§ 5. Distribution of powers and duties.—The state in modern times makes very large use of municipal corporations in the work of state government. But ordinarily local administration of state affairs is conducted by the counties and townships. The distribution of powers and duties varies in the different states. We find at the present time three systems of local administration based upon the unit of administration: the New England system, the Southern system and the Compromise system. In the New England system, the town, or as it is known in the West, the township, is the unit of administration, while the county is only slightly used. In the Southern system the county is the administrative unit, and nearly all the administrative business, not municipal in character and not affecting education, is centered in the county officers. In some states the county officers attend to school business; while in others the school district has been created. In some of the Southern States there is an area lower than the county, called the township, but it is simply an administrative district, and not generally a corporation.²²

The Compromise system is the most widely prevalent. It developed in New York and Pennsylvania, and provides for a distribution of administrative affairs somewhat equally between the county and the town. In the Pennsylvania, or Commissioner form of this system, the county authority consists of commissioners elected by the people of the county at large; while in the Supervisor, or New York, form, the governing board consists of supervisors elected from the towns of which the county is composed. The Supervisor form is found in New York, Michigan,

²⁰ *Wilson v. School District*, 32 N. H. 118; *Foster v. Lane*, 30 N. H. 315; *Giles v. School District*, 31 N. H. 304; *Scales v. Chattahoochee Co.*, 41 Ga. 225; *Rogers v. People*, 68 Ill. 154; *Beach v. Leahy*, 11 Kan. 23; *Conklin v. School District*, 22 Kan. 521; *Riddle v. Merrimack River Locks*, 7 Mass. 169, 5 Am. Dec. 35.

²¹ *Winspear v. District, etc.*, 37 Iowa, 542; *Curry v. District*, 62

Iowa, 102. *Contra*, *Heller v. Stremmel*, 52 Mo. 309. Incorporated board of public schools, see “The Laws Relating to City School Boards,” by James C. Boykin, in Report of Commissioner of Education for 1895-96, vol. 1, ch. 1.

²² Goodnow, *Principles of Administrative Law*, 182 *et seq.*; Howard, *Local Const. Hist.*, I, ch. IX.

Illinois, Wisconsin, Nebraska, and in a modified form in Virginia.²³ The Commissioner plan is found in Pennsylvania, Ohio, Indiana, Iowa, Kansas and Missouri, and in a modified form in Maine, Massachusetts, Minnesota and the Dakotas, and has "very generally been adopted as the form for the county authority in the commonwealths of the South, where there are in the county generally no lesser districts to be represented."²⁴

§ 6. The county—its organization and functions.—The American county was, in the first instance, "a frontier copy of the English shire," although its growth affords no analogy to that of its English prototype. The shire is an historical unit with boundaries as natural as that of the nation, while our counties have been deliberately "laid out" as a part of the machinery for the administration of the government of the state.²⁵

In the West and Southwest the adaptability of the county to the needs of a widely-scattered population led to its adoption as the chief organ of local government, while the mental characteristics of the early inhabitants of the Eastern states, and the conditions imposed upon them by religious and climatic influences, there led to the adoption of the township as the administrative unit. Natural conditions have modified both the county and the township in the Western states. The Southern settlers adopted the county as the unit of administration,²⁶ while the immigrants from New England carried with them their ideas of the importance of the town and the town meeting. In New England the county was originally created solely for judicial purposes, although in the process of time certain other functions have been taken from the township and conferred upon it. In the West and Northwest the township and the county exist side by side with carefully differentiated functions. The power and

²³ Howard, *Local Const. Hist.*, I, p. 439.

²⁴ 1 Goodnow, *Comparative Administrative Law*, p. 180.

²⁵ Wilson, *The State*, § 1026.

²⁶ Doubtless because of the nature of the country and the character of the people, but contrary to the advice of its early statesmen. Jefferson wrote: "Those wards called townships in New England are the

vital principle of their governments, and have proved themselves the wisest inventions ever devised by the wit of man for the perfect exercise of self-government and for its preservation. * * * As Cato, then, concluded every speech with the words, '*Carthago delenda est*,' so do I every opinion with the injunction, 'Divide the counties into wards.'" Works, VI, 544.

importance of the county consequently depends much upon its location, and this must not be lost sight of in determining the bearing of the decisions of the various states. Thus, in New England, where its powers are most restricted, its functions scarcely extend beyond the maintenance of county buildings, the granting of certain licenses and a partial control over highways, while in the South it has a complete set of officers and is practically charged with the entire local government. Under the common form of organization we find the county commissioners, and under their general supervision a county treasurer, auditor, superintendent of education, superintendent of roads and a superintendent of the poor. On the judicial side there is the sheriff, clerk of courts, surrogate or ordinary or probate judge, and the state's attorney, who frequently acts for a judicial district composed of several counties. Where the township exists the county organization varies greatly, almost the only common point of resemblance being its control over the administration of justice. The county commissioners are variously elected and constituted. Under the Commissioner system, as in Indiana, Pennsylvania, Ohio, Iowa, Kansas and Minnesota, they are elected by the electors of the county, while under the Supervisor system of New York, Michigan, Illinois, Nebraska and Wisconsin, the board is composed of all the township supervisors. Somewhat wider powers seem to be granted where the Commissioner system exists. In Rhode Island the only county officers are those connected with the administration of justice. Elsewhere than in New England the administration of schools, the relief of the poor, the construction and maintenance of highways and matters of sanitation, and the control of the police, commonly falls to townships, while the county is charged with the administration of justice, the maintenance of jails, court-houses and poor-houses, and the equalization of taxes. Wherever found, however, counties are public *quasi*-corporations and possess such powers only as are conferred upon them by statute.

§ 7. The township.—The township is older than the county or the English shire. It is the lineal descendant of the ancient Germanic mark, and was revived by the early settlers of New England as best adapted to their condition. It was “a case of revival of organs and functions on recurrence of the primitive

environment."²⁷ These towns were from the first the administrative units, but were ultimately grouped for judicial purposes into counties, to which certain of their functions were transferred. This system of government by the town meeting is practicable only where the numbers who are to participate are limited and the capacity for self-government is highly developed. Hence, while the system is still efficient, it has been somewhat impaired by the influx of a foreign population, untrained in self-government, and by the growth of great cities.

§ 8. The town meeting.—A New England town is the best modern representative of a pure democracy. All the qualified voters of the territory are members of the corporation, and meet at certain periods as a general assembly for the transaction of the business of the community. The representative system is not used, and each voter is entitled to participate personally in the work of government. The regular annual sessions are generally held in the spring of the year. They are presided over by a moderator and are attended by the town officers, who render their accounts for the year and their estimates of the money required for the ensuing year. The meeting approves or disapproves of the action of its officers and elects their successors. The organization of the towns is not entirely uniform, although they are all apparently formed upon one model, established by general laws. The officers are commonly from three to nine selectmen, a town clerk, a treasurer, a collector of taxes, assessor, a school committee, and such other minor officers as constables, library trustees and surveyors of highways. All the executive functions of local government are in the hands of these officials, governed largely by general statutes. The taxes for the payment of county expenses are apportioned by the counties, but are raised by the towns.²⁸

²⁷ Howard, *Local Const. Hist.*, I, ch. 2; Adams, *Germanic Origin of New England Towns*, J. H. U. Studies, 1st Series, No. 11. Criticised, Doyle, *The Puritans*, I, p. 74.

²⁸ *Warren v. Charlestown*, 2 Gray, 84; *Hill v. Boston*, 122 Mass. 344; *Commonwealth v. Roxbury*, 9 Gray, 451; *Eastman v. Meredith*, 36 N. H. 284. For the history, organization and value of the town meeting, see

Bloomfield v. Charter Oak Bank, 121 U. S. 121; Quincy's *Memorial Hist. of Boston*, ch. 1; Bryce, *American Commonwealth*, chs. 48, 49; Howard's *Local Const. Hist. of the U. S.*, vol. 1, ch. 2; Freeman's *Growth of the English Constitution*, 17; Lecky, *History of the Eighteenth Century*, I, 387; John Stuart Mill, *Representative Government*, p. 64; May, *Constitutional Hist. of*

§ 9. **The township elsewhere than in New England.**—The New England township sprang out of the church, the Western township out of the school. In the West the government surveyor preceded the settler, and laid out the land into regular squares to which he gave the name of townships; and of each of these congress reserved two square miles for the endowment of schools. The organization necessary for the administration of this grant became the basis of the township as a political organization. The township was organized on the county. “The Northwestern township,” says Dr. Wilson,²⁹ “is more thoroughly integrated with the county than is the New England township. County and township fit together as pieces of the same organization. In New England the township is older than the county, and the county is a grouping of townships for certain purposes; in the Northwest, on the contrary, the county has in all cases preceded the township, and townships are divisions of the county. The county may be considered as the central unit of local government; townships are differentiated within it.”

The township organization is strongest in the East and weakest in the South. It has been most generally accepted in New York, Pennsylvania, Ohio, Indiana, Kansas, Michigan, Wisconsin, Illinois and Minnesota. “In the states of this group,” says Prof. Howard, “localism finds its freest expression: the town meeting possesses powers commensurate with the requirements of modern life; the primitive and proper nexus between *scir* and *tunscipe* is restored; the township is under the county but represented there. The county board of supervisors is the old scire-moot over again. The township-county system of the Northwest is one of the most perfect products of the English mind,

England, II, 460; De Tocqueville, Democracy in America, I, ch. V, p. 56; Adams, Germanic Origin of N. E. Towns, Johns Hopkins Univ. Studies, 1st Series, No. 11, p. 5; Channing, Town and County Govt. in the New England Colonies of N. Am.; J. Toulmin Smith, Local Self-Government and Centralization, 29. 1 Andrews, American Law, § 378. Special attention is directed to

Hosmer's Life of Samuel Adams, ch. XXIII (American Statesmen Series), and the same learned author's work on “Anglo-Saxon Freedom,” ch. XVII. For a Tory estimate of the town meeting see the letters of Gov. Hutchinson in Hosmer's Life of Hutchinson.

²⁹ Shaw, Local Government in Illinois, p. 10.

worthy to become, as it may not improbably become, the prevailing type in the United States."³⁰

In the far West, in states such as California, Oregon and Nevada, the county is the unit of government, although the township is well developed in California. Virginia has had a complete township system since 1870, and the tendency throughout the South and West seems to be toward the strengthening of the township. Its organization differs according to its development, ranging from the pure democracy of New England to the representative system of the West. Where the departure from the original type is greatest, the town meeting has given place to the ordinary process of election. The selectmen are nowhere found outside of New England, but their functions are discharged by supervisors, who have general charge of the affairs of the township. These officers vary in number from one to three, and are sometimes, as in Ohio, designated as trustees. The powers of all townships are such and such only as are conferred on them by statute.³¹

§ 10. The English municipality.—The origin of our municipalities is found very far back in English history.³² The thickly-settled communities in England always had a peculiar organization. From the beginning of the Norman period the inhabitants of a town owed certain payments to the crown, which were collected by the sheriff, who was the fiscal representative of the crown. The large towns or boroughs finally contracted to pay a fixed sum, which they were allowed to raise in such manner as they saw fit. This privilege was called the *firmi burgi*. It was in fact a lease of the town to its inhabitants. For the collection of this quota, the people under the supervision of the crown selected an officer, who was called the *fermor* or mayor. In consideration of the payment of a sum of money, the crown also granted to the inhabitants of a special district the privilege of holding a court, and exempted them from the jurisdiction of the sheriff's tourn. which was the ordinary crown court. The union of these

³⁰ Local Self-Government in the United States, I, p. 158, quoted in Hosmer's Anglo-Saxon Freedom, p. 290.

³¹ Bloomfield v. Charter Oak Bank, 121 U. S. 121; Hooper v. Emery, 14 Me. 375.

³² This and the following section are taken largely from Prof. Goodnow's valuable work on Comparative Administrative Law.

privileges, known as the court leet and the *firmi burgi*, constituted an incorporated borough. The townsmen, meeting in court leet, found it a natural and easy matter to assume such other functions as were necessitated by the presence of a large number of persons in a small district. They established rules as to participation in the court leet and as to the election of a mayor or provost. The general rule was that no one could participate in the leet who did not pay taxes, was not a householder, and was not, in the eye of the law, capable of participating in the administration of justice. In the quaint language of the period, only those could be members of the court leet who were freemen householders, paying scot and bearing lot; and the formal criterion of the existence of these qualities in a given person was the fact that he had been sworn and enrolled in the court leet. This body had thus the ultimate decision as to the qualifications of municipal citizenship.

After the formation of parliament, the quota of the borough was fixed by that body, and nothing remained to be done by the town but to assess the quota. The judicial system also underwent a change. The royal courts gradually absorbed all judicial functions, and the court leet became a jury for the determination of questions of fact. Such questions and the assessment of the quota could be more easily settled by a committee than by the large assembly, and the result was a formation of a committee of the original court leet for the transaction of both financial and judicial business. This committee gradually assumed the performance of all municipal business. It was composed of the largest taxpayers, who generally also held the commission of the peace. The smaller taxpayers gradually lost their equal privileges by neglecting to exercise them. As social and economic conditions changed, the qualifications for membership changed. In the larger cities membership in one of the great trade guilds became essential to the exercise of municipal functions. The limited body thus organized became finally the borough council or leet jury.³³

About this time the crown began to grant charters of incorporation to the body of rich and influential citizens who consti-

³³ See Gneist, *Self-Government*, For a description of modern English municipal corporations, see Pol. II, pp. 140, 141; Pollock & Maitland, *Hist. of Eng. Law*, I, p. 625. Sci. Quar., IV, pp. 197, 216.

tuted the town council. The original object was to enable the district to hold property and to sue and be sued. Finally these bodies were granted representation in parliament, and thereafter their charters were granted and revoked by the crown when necessary to increase or maintain the political influence of the crown in parliament.³⁴ The result was the system of rotten boroughs so well known in history.

§ 11. The American municipality.—The early American municipalities were modeled upon the English municipality as it existed in the seventeenth century. The city authority was in the town council, which was composed of the mayor, recorder, aldermen and councilmen. They were organized for the satisfaction of purely local needs, such as the management of the corporate property and finances, and the enactment of local police ordinances. The affairs of the colony within the municipality were attended to by a body of officers similar to those in the county and rural districts. But gradually the municipalities lost their local character and began to be used by the state as agencies of the state government. The corporation, which originally consisted of the members of the council, came to be regarded as consisting of the people residing within the district. The state made use of the city officials for the purposes of state administration, and used the municipality as an agent for the collection of taxes. The cities thus largely lost the power of regulating their purely local affairs; and instead of being organs for the satisfaction of local needs in accordance with the wishes of the inhabitants, became the agencies of the state government, very much in the same manner as counties and other such subdivisions of the state.³⁵

The plan of organization also changed. Instead of the consolidation of powers and functions in the council, they were

³⁴ Dillon, *Mun. Corp.*, I, § 18; Allison & Penrose, *Hist. of Phila.*, p. 10; *Rex v. London*, 8 Howell, St. Trial, 1039. The judgment passed on London was followed by similar informations against the other towns. Most of the towns anticipated the attack by voluntarily surrendering their charters, in the place of which they received new ones "after a conservative pattern."

The justices of assize especially abused their official powers to this end. Jeffreys, on the northern circuit, "made all charters fall before him like the walls of Jericho, and returned to London laden with surrenders, the spoils of the towns." Gneist, *Const. Hist. of England*, II, p. 308.

³⁵ *United States v. B. & O. Ry. Co.*, 17 Wall. (U. S.) 322

separated and distributed among the council and the executive officers. The duty of deliberation is now generally left to the council, although it often exercises administrative power; while that of execution and administration is left to officers selected for that purpose.³⁶

³⁶ *The forms of city government.*
—The corporate powers of municipalities are usually vested in a deliberative assembly or council, composed of representatives elected by the voters. This council is a lineal descendant of the court leet, or common council, of the original English borough. The primitive borough-court was an assembly of all the freemen of the borough; but in time an official head, the mayor, was developed, and a select, representative body. To this select body, with the mayor as its head, the powers of the corporation were later, by usage and by the terms of charters, entrusted.

Charters of cities and boroughs in the American Colonies followed the English form. Usually the select body consisted of the mayor as presiding officer, the recorder as clerk, and two classes of representatives, the aldermen and the councilmen; and the assembled council, wielding the jurisdictions of the corporation, consisted of these three integral parts, a specified number or a majority of each class, beside the mayor, being requisite to a quorum. In most boroughs the mayor was appointed by the provincial governor, but in some was elected by the council. The aldermen and councilmen were generally elected by the freemen; but in three boroughs, in which they held office for life, they were elected by the council itself, thus constituting a close corporation.

After the Revolution the mayors

came to be elected by the councils from among their own numbers, or in some cases by the inhabitants. The entire council long continued to exercise both the legislative and the executive powers of the corporation, the latter either directly through various committees, or vicariously through the mayor or through officers appointed and directed by itself.

Toward the middle of the nineteenth century, the need of fixing and enforcing responsibility for executive efficiency caused charters to be framed so as to assign the different executive departments to superintending heads, elected by the people. Some departments which administered purely state functions, were wholly severed from the corporate structure and placed under statutory direction; and in many instances their heads have since been made appointable and removable by the governor. The call for centralization continued, and was ultimately accomplished by the practice in charters of charging the mayor with the duty of appointing the superintendents of the ordinary departments, and of supervising their work. The mayor has thus been made an executive head of the municipality—often still presiding in the council and there having a casting vote, but usually wholly severed from that body, though invested with a veto power.

At the dawn of the twentieth century, the typical city government consists of a single representative

body—a council or board of aldermen consisting of representatives elected from the different wards—a mayor elected by the people, and a variety of executive departments under superintendents appointed by the mayor with or without the consent of the council, and removable by him for cause. Yet in many cities, such important officers as treasurer, controller, city solicitor, and city clerk, are elected by the council, or by the voters; and the details of the scheme vary greatly.

The province of the council is to enact police ordinances, standing administrative ordinances, and initiatory ordinances for special works, and to make the necessary appropriations. The province of the executive departments is to maintain the works in their charge respectively, to carry out the measures decided upon by the council, determine the technical or administrative details, and make the contracts and purchases therefor—always within the limit of some annual or special appropriation, subject to the charter and the standing ordinances of the council, and to the direction and supervision of the mayor.

Corruption, inefficiency, and the never-ending results of political chicanery, have led recently to one more step in the concentration of authority and responsibility. This has been taken in what is known as the commission plan. The first and most radical type—the Galveston form—vested the entire government of the city in a commission ap-

pointed by the governor. The second—the Des Moines form—which has been adopted (perhaps over-hastily) in many other cities, provides for a mayor and four aldermen to be elected from the city at large, without party designation, for a term of two years, who constitute collectively the city council. In them as a council is combined all the legislative and initiative authority of the city, with power to appoint the subordinate municipal officers. Its meetings are presided over by the mayor but without veto power. The important feature of the plan is that by which the executive work of the city is divided among five departments, and the five members of the council are required separately to act as executives—each as superintendent of one of the departments. As the system of government so framed is adapted chiefly to the needs of efficient executive service, there is inserted in it, to secure the popular voice in important measures, a popular right of initiative and of compulsory referendum in legislation. The great power combined in a few men is sought to be offset by the popular right of recall during the term of office. The power of the legislature to create such a form of city government is affirmed, and various constitutional questions are disposed of, in *Eckerson v. Des Moines*, 137 Ia. 452, 115 N. W. 177; *Graham v. Roberts*, 200 Mass. 151. The Galveston charter was upheld in *Brown v. Galveston*, 97 Texas 1.

CHAPTER II.

THE CREATION OF PUBLIC CORPORATIONS.

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| <p>§ 12. Source of creation.
13. Power of Congress to create.
14. Power of territorial legislatures to create.
15. Creation by implication.
16. Invalid organization. <i>De facto</i> corporations.
17. Presumption of creation.—Prescription.
18. Creation by recognition.</p> | <p>§ 19. Name and boundaries of territory.
20. Authority of a legislature to invest with power.
21. Compulsory incorporation.
22. Compulsory changes in charters.
23. Form of legislation.
24. Form of proceedings under general laws.</p> |
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§ 12. **Source of creation.**—The power to erect subordinate corporations to act in local administration, either as bare instrumentalities of the central government or as municipal bodies, is a power inherent in sovereignty. In our constitutional system, the authority to exercise that power is impliedly vested in the legislature, as included in its general authority to provide agencies for the administration of government. All public corporations in this country are therefore creatures of legislation. In order that there may be such a corporation, there must have been legislative action in such form and within such limitations as may have been prescribed by constitution.¹ But such action may sometimes be proved by circumstantial evidence, and, as will hereafter be seen, may, under certain circumstances, be conclusively presumed.²

¹ *New Boston v. Dunbarton*, 12 N. H. 409; *Hope v. Deaderick*, 8 Humphrey, (Tenn.) 1, 47 Am. Dec. 597.

"The capacity of being a corporation can only be conferred by the state. It cannot be assumed by individuals. By no form of agreement, without this co-operation of

law, can any number of persons become a corporation, because it is not within the power of individuals to change their personality." 1 Andrews, *American Law*, § 370.

² *New Boston v. Dunbarton*, *supra*; *Bow v. Allenstown*, 34 N. H. 351.

§ 13. Power of Congress to create.—The Federal government is invested with the general powers of sovereignty over such enumerated matters as are expressly placed under its authority by the Federal constitution. Congress has power, therefore, to create public corporations to carry out the Federal purposes. It can create a governmental bank,³ or incorporate a railroad company, or a bridge company, for interstate commerce.⁴

Congress has express power, under the United States' constitution, "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia; and has, therefore, the same power to establish public corporations within the District that a state legislature has in a state.⁵ By virtue of the Federal sovereignty over the public domain, Congress can also create public corporations in the territories.⁶

Congress may also establish such incorporated boards or commissions as it deems necessary to assist in administration of Federal government.

§ 14. Power of territorial legislatures to create.—The general authority of Congress to provide a government for a territory enables it to invest such a government with the powers of sovereignty, to be held and exercised subordinately. In establishing territorial legislatures, Congress can provide, and usually has provided, in the organic statutes that their power "shall extend to all rightful subjects of legislation." Such a clause confers authority to create municipal corporations,⁷ and to confer on them the usual competency to make and enforce local ordinances.⁸

³ *McCullough v. Maryland*, 4 Wheat. 316, 411, 422; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 861.

⁴ *Pacific Railroad Removal Cases*, 115 U. S. 1; 38 L. Ed. 808; *Luxton v. North River Bridge Co.*, 153 U. S. 525. These cases involved private corporations (*quasi-public*) but doubtless the same principle admits of the creation of purely public corporations for the same purpose. In creating corporations of this nature Congress may confer the right of eminent domain, without the consent of the states within which the

property is to be taken. *Luxton v. North River Bridge Co.*, *supra*.

⁵ It may incorporate the entire District. *Stoutenburgh v. Hennick*, 129 U. S. 141; *Barnes v. District of Columbia*, 91 U. S. 540.

⁶ *Deltz v. City of Central*, 1 Col. 332.

⁷ *Deltz v. City of Central*, 1 Col. 323; *Riddick v. Amelin*, 1 Mo. 5; *People v. Butte*, 4 Mont. 174; *Vincennes University v. Indiana*, 14 How. (U. S.) 268; *Burnes v. Atchison*, 2 Kansas, 454.

⁸ *State v. Young*, 3 Kan. 445.

§ 15. Creation by implication.—Ordinarily a legislature need not use any prescribed terms or form in creating a public corporation. It is not even necessary that the intention to incorporate be positively expressed in words. Where a legislature confers or imposes upon a certain community or body of persons, by a collective name, powers or liabilities of such a character that they can be held or sustained only in a corporate capacity, it will be deemed to have created a corporation; at least in so far as may be necessary to give effect to the purposes of the enactment.⁹ But it is only in clear cases of intent, or where necessary to give effect to rights and remedies or to permit a grant to be enjoyed, that corporate powers will be implied.¹⁰

§ 16. Invalid organization; de facto corporations.—If, in

⁹ *Russell v. Men of Devon*, 2 T. R. 672; *Conservators of River Tone v. Ash*, 10 Barnwell & C. 349; *Overseers of the Poor, etc. v. Sears*, 22 Pick 122; *Benton v. Jackson*, 2 Johnson's Ch. 325; *No. Hempstead v. Hempstead*, 2 Wend. 109; *Inhabitants v. Wood*, 13 Mass. 193; *Dean v. Davis*, 51 Cal. 406; "Whenever a duty is imposed, all the power necessary for its proper performance is given, if not expressly, then by inevitable implication." *Bessey v. Unity*, 65 Me. 342; *Chicago, Tr. v. Chicago*, 207 Ill. 37; *Hunneman v. Fire District*, 37 Vt. 40. In *Stebbins v. Jennings*, 10 Pick. 172, at 188, Shaw, C. J. said: "It is a principle of law which has often been acted upon, that where rights, privileges and powers are granted by law to a body of persons, by a collective name, and there is no mode by which such rights can be enjoyed, or powers exercised, without acting in a corporate capacity, such bodies are deemed by necessary implication, to be so far corporations, as to enable them to enjoy and exercise the rights and powers thus granted. So when a duty or obligation is imposed; for where

the law gives a remedy against an aggregate body, it gives a right of action, and to that extent constitutes them a corporation by implication." *Blair v. West Point Precinct*, 2 McCrary (U. S. Ct. Ct.) 459.

In *Jordan v. Cass County*, 3 Dillon, 185, at 189, the court said: "Undoubtedly the legislature designed that there should be a remedy upon these bonds, and if it were consistent with the legislative intent, the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, a body corporate, and, as such, liable to be sued."

¹⁰ *Stebbins v. Jennings*, *supra*; *Blair v. West Point Precinct*, *supra*; "But when the corporation arises by inference, in order to support a contract, which, as a class, they are directed by statute to enter into, they constitute a corporation solely for that single purpose; and if the contract is not within the statute, they do not contract as a corporation;" *Justices of Cumberland v. Armstrong*, 14 N. C. (3 Dev.) 284.

proceedings for the formation of a public corporation, there has been a failure to conform to some requirement of the incorporating law, principles are applied similar to those applied in cases of defective private corporations. Where the provision is intended by the legislature to be merely directory, the neglect to observe it, though an irregularity, does not invalidate the organization.¹¹ If, on the other hand, the requirement be intended to be mandatory, a failure to perform it renders the incorporation invalid; the body does not become a corporation *de jure* and may be ousted of its claim to corporate powers in *quo warranto* proceedings brought on behalf of the public.¹² The doctrines regarding *de facto* existence, however, bar all parties from setting up the defect collaterally. The rule is that where there is a law in force which authorizes the corporation to exist *de jure*, and an attempt has been made in good faith to organize under that law, which attempt has resulted in a formation substantially as prescribed therein, the neglect to perform some minor condition, being of interest only to the state which imposed it, cannot be taken advantage of collaterally in ordinary suits by or against the body as a corporation. The rule is founded partly on public policy, partly on the theory that so long as the state does not interfere its acquiescence renders the defect unobjectionable.¹³

Some courts have decided that a corporation organized under an unconstitutional law is to be deemed a corporation *de facto* until the unconstitutionality has been judicially determined.¹⁴

§ 17. Presumption of creation; prescription.—Under the rules of evidence applicable to corporations in general, it is sufficient *prima facie* secondary evidence of existence to prove a charter or law authorizing incorporation, and a user under it;¹⁵

¹¹ Endlich, Interpretation of N. W. 120, 49 L. R. A. 483; Stuart v. School Dist., 30 Mich. 69. See

¹² State v. Tracy, 48 Minn. 497, 51 N. W. 613, and cases cited. The action should be against the alleged corporation, by name, not against the individuals who have usurped the franchise. People v. Clark, 70 N. Y. 518.

¹³ Methodist Ch. v. Pickett, 19 N. Y. 482; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Cozzens v. Chicago, etc. Co. 166 Ill. 213; Gilkey v. Town of How, 105 Wis. 41, 81

N. W. 120, 49 L. R. A. 483; Stuart v. School Dist., 30 Mich. 69. See §§ 186, 187, *infra* "De facto Officers."

¹⁴ Speer v. Board, 88 Fed. 749, 32 C. C. A. 101; Donough v. Dewey, 82 Mich. 309, 46 N. W. 782, doubted in Thompson v. Couch, 144 Mich. 671; Attorney-General v. Dover, 62 N. J. L. 138, 41 Atl. 98; Lang v. Bayonne, 74 N. J. L. 455, 68 Atl. 90; Smith v. Sheely, 12 Wall. 35.

¹⁵ Methodist Ch. v. Pickett, 19 N. Y. 482.

or to prove a long established organization and reputation as a legitimate corporation.¹⁶ In such cases the usual presumption of regularity and legality arises.¹⁷

Where the issue of corporate existence is raised collaterally, and the evidence shows a *de facto* existence, the presumption is irrebuttable under principles of the last section. In *quo warranto* or other proceedings where validity is directly in issue, a *de jure* existence must usually be affirmatively shown. But in some decisions it has been held that lapse of time will render the presumption applicable to sustain the corporation, *prima facie*, even as against the state in such proceedings.¹⁸ Probably as a general rule, resting on the historical nature of a municipal charter as a grant of franchises, the principle of prescriptive rights will, after a period of twenty years, render the presumption of legal creation conclusive, even as against the state.¹⁹

Upon presumptive proof of a public corporation, the body will be taken to be invested with the powers usually bestowed upon corporations of the kind concerned.²⁰

§ 18. Creation by recognition.—A body which is acting as a public corporation, under a claim of legal authority, but without in fact having been validly created, may be made a rightful corporation by legislative recognition. If the formation and purpose of the organization are such as the legislature might constitutionally have authorized, a statute which expressly or impliedly recognizes it as being what it claims to be, confirms its pretensions and renders it a valid corporation.²¹ Thus, a statute

¹⁶ *Stockbridge v. W. Stockbridge*, 12 Mass. 400; *Prentiss v. Davis*, 83 Me. 364; *State v. Williams*, 27 Vt. 755; *Barnes v. Barnes*, 6 Vt. 388; *Dillingham v. Snow*, 5 Mass. 547.

¹⁷ *Bank of U. S. v. Danbridge*, 12 Wheat. 64.

¹⁸ (Four years, [*dicta*]) *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304. "After a lapse of more than twenty years, during which the territory has exercised all the functions of a municipal government with public acquiescence, strict proof of legal organization will not be required in *quo warranto*, and the defendant need make only such

proof as the nature of the case will permit." *People v. Pike*, 197 Ill. 449; *State v. Harris*, 102 Minn. 340, 113 N. W. 887; *State v. Leatherman*, 38 Ark. 81.

¹⁹ *Bow v. Allenstown*, 34 N. H. 351; *Roby v. Sedgwick*, 35 Barb. 319; *People v. Pike*, *supra*.

²⁰ *Roby v. Sedgwick*, *supra*.

²¹ *Society v. Paulet*, 4 Peters (U. S.) 480; *People v. Farnum*, 35 Ill. 562. The community must have been, at the time of the enactment claiming to be, and acting as, the corporation which it is contended has been established. See *Railway Co. v. Jordan*, 113 Ga. 687.

which annexes territory to "the town of Allenstown," a supposed town, makes the community a valid town corporation;²² and a statute which authorizes a town to subscribe to railroad stock and issue bonds as a corporation, precludes subsequent inquiry into the validity of the town's organization, even in proceedings on *quo warranto*.²³ Apparently the recognition relates back, and validates corporate acts from the beginning.²⁴

§ 19. Name and boundaries of territory.—The incorporation of the inhabitants of a locality, to be operative, must fix the territorial boundaries.²⁵

Ordinarily the statute provides a name for the corporation; but under general incorporation laws the corporation is usually permitted to select the name itself.²⁶

§ 20. Authority of a legislature to invest with governmental power.—The power to legislate for all parts of the state is vested in the legislature, and as a general rule that body has no authority to delegate its trust to others. An important exception to this rule is that the legislature may delegate legislative power, in any of its forms, to self-governing local communities for local purposes. The principle which permits this has come to us through English and Colonial institutions, and is impliedly confirmed by our constitutions. When the constitutions were adopted, the power to grant privileges of local self-government had been exercised by the crowns of Europe from the earliest times; municipalities had long existed in the American colonies under charters from proprietaries and companies who held colonial domains, and towns had become established by custom, usage and statutory recognition. Colonial municipalities had always been invested with authority to pass local ordinances or by-laws, and had often been granted special authority to tax their

²² *Bow v. Allenstown*, 34 N. H. 351. But a statute referring to an incorporated town as a city, and amending its charter, was held not to make the town a city. *Railway Co. v. Jordan*, *supra*.

²³ *Jameson v. People*, 16 Ill. 257. But a statute merely validating the past acts of the officers of an invalid county organization does not,

by recognition, establish the county generally. *Smith v. Anderson*, 33 Minn. 25.

²⁴ *Basshor v. Dressel*, 34 Md. 503.

²⁵ *Cutting v. Stone*, 7 Vt. 471; *Galesburg v. Hawkinson*, 75 Ill. 152, at 156.

²⁶ *Johnson v. Indianapolis*, 16 Ind. 227.

inhabitants. Our constitutions were adopted with these institutions in view, and in contemplation of their continuance.²⁷

§ 21. Compulsory incorporation.—In the absence of constitutional requirement, the consent of the people of a locality is not requisite as a condition to their incorporation as a public corporation; for no contract relation is imposed by the charter. The legislature may, however, and usually does, provide that incorporation shall be dependent on their acceptance. Such a provision is not an unconstitutional delegation of legislative discretion to the local voters, for municipal charters have retained much of their original nature as grants of privileges.²⁸

If a charter is made to take effect immediately, the corporation springs into existence even before any organization by the inhabitants; and every resident citizen becomes subject to the political requirements of membership regardless of his own will.²⁹

²⁷ "It has already been seen that the legislature cannot delegate the power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of State policy or dangers of local abuse to warrant the interposition." Cooley's Const. Lim. p. 264. See *People v. Draper*, 15 N. Y. 532; *Cheaney v. Hooser*, 9 B. Munroe, 338; *State v. Noyes*, 30

N. H. 279. 1 Andrews, American Law, § 402.

²⁸ *Paterson v. Society for Useful Manufactures*, 24 N. J. Law, 385; *State v. Govan*, 70 Miss. 535, 12 So. 959; Cooley, Const. Lim. (7th ed.) 166, 167, and many cases cited.

²⁹ Bell, J., in *Berlin v. Gorham*, 34 N. H. 266, said: "The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The Legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself."

If it be made to take effect upon acceptance by a majority vote of the local electorate, it binds upon such acceptance those who opposed as well as those who favored adoption.³⁰ Inhabitants of adjacent territory may become incorporated into a municipality by simple annexation of the territory.³¹ Compulsory incorporation of municipalities is now impossible under express provisions of many state constitutions.³² A provision which forbids setting up a city government in a town except with the consent of a majority of the inhabitants, does not apply to the annexation of the territory of the town to a city.³³

§ 22. Compulsory changes in charters.—The same ground which admits of compulsory incorporation of public corporations, namely the nature of the charter or statute as a mere measure of constructive government containing no element of contract, supports amendment of the act of incorporation, and even the repeal thereof, without the consent of the inhabitants.³⁴

³⁰ *Taylor v. Newberne*, 2 Jones's Eq. 141, 64 Am. Dec. 566; *Clarke v. Rogers*, 81 Ky. 43.

³¹ *Blanchard v. Bissell*, 11 Oh. St. 96; *State v. Cincinnati*, 52 Oh. St. 419, 27 L. R. A. 737; *Laramie Co. v. Albany Co.*, 92 U. S. 307.

³² *Infra*, § 23 and Chapter XX. By Mass. Constn, Amendments, Art. II, the legislature can establish a city government only in a town which has 12,000 inhabitants or more, and then only upon acceptance by a majority of the voters thereof. See, also, Penn. Constn., Art. 15, § 1; Texas, Art. 11, §§ 4, 5, W. Va. Art. 6, § 39.

³³ *Chandler v. Boston*, 112 Mass. 200.

³⁴ "Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between them and the legislature of the State, because there is not and cannot be any reci-

procity of stipulation, and their objects and duties are utterly incompatible with every thing of the nature of compact. * * *

Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature." Clifford, J., in *Laramie Co. v. Albany Co.*, 92 U. S. 307.

"A corporation being the creature of the legislature, it necessarily follows, that unless its creation involves a contract and vested rights on the part of the corporation, it is at all times subject to legislative control, and may have its privileges and immunities enlarged or diminished from time to time, as the public good may require, and at the discretion of the legislature, and this is particularly the case with

§ 23. **Form of legislation.**—The older method of incorporation, by special charter, is still permissible in Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Louisiana, Maine, Massachusetts, Maryland, Nevada, New Hampshire, New York, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Vermont and Wisconsin,³⁵ in some with special constitutional restrictions.³⁶ Except where special restrictions have been adopted, in one or two states, the legislature of any state in which special charters are permitted may in its discretion provide general laws instead.³⁷

In many states, the inconvenience of having different municipalities with varying powers, and the complaint that special legislative action concerning particular cities is often induced by political considerations, have led to the adoption of constitutional provisions which forbid the creation or modification of municipal corporations by special act, and require that the legislature provide for their creation and government by general law. Such

municipal corporations created for the ordering and governing of towns and cities. The delegation of higher and greater powers may be required at one time than another, and they may therefore, very properly, be expanded or contracted at pleasure, according to the necessity of the case." Turley, J., in *Nichol v. Mayor & Aldermen of Nashville*, 9 Humphrey (Tenn.) 253, at 263. See *Hunter v. Pittsburg*, 207 U. S. 161, 178.

³⁵ Ala. Const. (1875), art. 14, § 1; Colo. Const. (1876), art. 15, § 2; Ga. Const. (1877), art. 3, § 6; Idaho Const. (1889), art. 11, § 2; Maine Const. (1876), art. 4, § 14; Md. Const. (1876), art. 3, § 48; Nev. Const. (1864), art. 8, § 1; New York Const. (1900), art. 8, § 1; N. C. Const. (1868), art. 8, § 1; Oreg. Const. (1857), art. 11, § 2; Wis. Const. (1848), art. 11, §§ 1, 3; Tenn. Const., art. 11, § 8, forbidding special acts of incorporation, has been

construed in *State v. Wilson*, 12 Lea 246, as not including municipal corporations.

³⁶ N. Y. Const., art. 3, § 18, forbids special or local bills incorporating villages. Tex. Const. (1876), art. 11, §§ 4, 5, provides that cities of 10,000 or less shall be created only by general law, cities of more than 10,000 by either special or general law. West Virginia does not permit special acts of incorporation for cities of less than 2,000. W. Va. (1872), art. 6, § 39.

³⁷ *Franklin Bridge Co. v. Wood*, 14 Ga. 80. But see as to effect of provision in Massachusetts Constitution (creation of cities by general law not permissible), *Larcom v. Olin*, 160 Mass. 102. Rhode Island Amendments, art. IX, provides that no corporation with the right of eminent domain or a franchise in streets of towns shall be created except by special act.

provisions are in force in Arkansas, California, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Mississippi, Nebraska, New Jersey, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, and Wyoming.³⁸ The common method adopted in enacting general statutes for this purpose is to classify cities according to population and provide a code of laws for each class.

The constitutions of some states expressly require that the legislature shall provide a "uniform system" of county, town, and municipal government.³⁹ But in those states in which special charters are still permitted, it is necessary to examine all the acts applicable to the particular city concerned; and in many of the older states, the various cities differ widely in their government, powers, and methods of procedure. In California, Missouri, Minnesota, Oklahoma, and Oregon, by constitutional provisions, and in Colorado, Michigan, and Washington, by general laws under express constitutional authorization, municipalities are permitted to frame and amend, by taking specified proceedings, their own charters.⁴⁰

³⁸ Ark. Const. (1874), art. 12, §§ 2, 3; Cal. Const. (1896 Amend.), art. 11, § 6; Ill. Const. (1870), art. 11, § 1; Ind. Const. (1851), art. 11, § 212; Iowa Const. (1857), art. 8, § 1; Kan. Const. (1859), art. 12, §§ 1, 5; Mich. Const. (1909), art. 8, §§ 20, 21, amending (1850), art. 15, § 1; Minn. Const. (1892), art. 4, § 33, amending (1857), art. 10, § 2; Miss. Const. (1890), art. 4, §§ 87, 88; Mo. Const. (1875), art. 4, § 53, art. 12, § 2, amending (1865), art. 8, § 4; Neb. Const. (1885), art. 11b, § 1; N. J. Const. (1844), art. 4, § 7, par. 11; N. D. Const. (1889), art. 2, § 69, art. 4, § 130; Ohio Const. (1851), art. 13, §§ 1, 6; Penn. Const. (1874), art. 3, § 7; S. C. Const. (1895), art. 3, § 34; S. D. Const. (1899), art. 10, § 1; Utah Const. (1895), art. 11, § 5; Va. Const. (1902), art. 7, § 117; art. 4, § 65; Wash. Const. (1899), art. 2, § 28; W. Va. Const. (1872), art. 11, § 1;

Wyo. Const. (1899), art. 13, § 1. By the "Harrison Act," 1 Supp. U. S. Rev. St., p. 503 (1886), territorial legislatures are forbidden to grant private charters or special privileges.

³⁹ Cal. Const., art. 11, § 4; Fla. Const., art. 3, § 24; Ga. Const., art. 11, §§ 3, 1; Idaho Const. (1896), art. 12, § 1; Mo. Const. (1888), art. 9, § 7; Nev. Const., art. 4, § 25; Ky. Const. (1894), § 156; Okla. Const., art. 18, § 1; S. D. Const., art. 10, § 1; Utah Const., art. 11, § 5; Wis. Const., art. 4, § 23.

⁴⁰ Cal. Const. (Am. Ed. 1902), art. 11, § 8, provides that a city of more than 3,500 inhabitants may frame its own charter in the following manner: A board of 15 freeholders is elected by the qualified voters, the board to prepare within ninety days a charter, which must be signed in duplicate by a majority of the board, and copies of

§ 24. Form of proceedings under general laws.—General laws for the incorporation of villages, towns and cities, usually designate, as proceedings for incorporation, four principal steps: (1) A petition to some official tribunal, signed by a prescribed number of voters or other persons, and containing specified allegations; (2) a general notice of the petition and of the time set for a hearing or an election (as the case may be); (3) either a general hearing before such tribunal, or a local vote in pursuance of its order, on the question whether incorporation should occur; (4) a decision by such tribunal, or a declaration of the result of the election, and the making of records or filing of a certificate as may be specified.⁴¹

It is to be noticed, however, that if the statute confides to a non-representative tribunal a general political discretion on the question of incorporation, as distinguished from an authority to determine facts, it contains an unconstitutional delegation of legislative power; and if it confers such discretion upon the courts, it contains an unconstitutional violation of the separation of powers.⁴²

which must be returned to the chief executive of the city and the recorder of the county. The proposed charter must then be published in two newspapers for at least twenty days, and afterward submitted to the electors for ratification and to the legislature for approval. Mo. Const. (1875), art. 9, § 16, requires 100,000 inhabitants, the election of a board of 13 freeholders, and adoption by a 4-7 vote of the electors. Minn. Const. (Amend. 1898), art. 4, § 36, requires 15 freeholders and a 4-7 vote. Oreg. Const. (1906 Amend.), art. 11, § 2, recognizes an exclusive right in a municipality to frame its own charter, subject to the Constitution and the criminal laws. Okla. Const. (1908), art. 18, § 3a, requires 2,000 inhabitants. Colo. (1901), p. 46, allows cities of

the first class to amend their own charters. Wash. Const., art. 11, § 10, requires 20,000 inhabitants. Mich. Const. (1909), art. 8, §§ 20, 21. See "The People and their City Charters," in Oberholzer's *The Referendum in America*, ch. IV, and "Home Rule for our American Cities," in *Annals of Am. Acad. of Pol. and Soc. Science* for May, 1893, vol. III, p. 736.

⁴¹ E. g. (Incorporation of a village; hearing and decision by county board of supervisors) Mich. Comp. Laws (1897), ch. 87; (Incorporation of city in place of village; petition to village council and order for election) Id. ch. 88.

⁴² *Territory v. Stewart*, 1 Wash. 98, 8 L. R. A. 106; *In re No. Milwaukee*, 93 Wis. 616; 67 N. W. 1033; 33 L. R. A. 638. Contrast *State v. Stout*, 58 N. J. L. 598, 33 Atl. 858.

CHAPTER III.

GENERAL SCOPE OF POWER.

§ 25. The general principle.	§ 31. Exercise of power beyond boundaries.
26. Comments upon the rule.	32. Statutory requirements as to form.
27. Rules of construction.	33. Constitutional limitations apply.
28. Usage.	
29. Manner of granting powers.	
30. General-welfare clause.	

§ 25. The general principle.—The legislature in creating public corporations confers upon them such powers as it deems most conducive to the public good. The powers of counties and townships are generally uniform, and are determined by general laws. Those of municipal corporations are often conferred by special charters, which results in great lack of uniformity. The powers of corporations, stated in general language, are such and such only as the legislature has conferred upon them. Those of municipal corporations, as classified by Judge Dillon, and approved by many courts, are:

1. Those granted in express words.
2. Those necessarily or fairly implied in or incident to the powers expressly granted.
3. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.¹

¹ Dillon, *Municipal Corporations* (4th Ed.), § 89; *Detroit Citizens' St. Ry. Co. v. Detroit*, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. 370; *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. 129; *Village of Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. 490; *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766; *Bentley v. Bd. Co. Com.*, 25 Minn. 259; *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *McAllen v. Hamblin*, 129 Iowa 329, 105 N. W. 593; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Taylor v. Bay City St. R. Co.*, 80 Mich. 77. "The powers expressly granted to a municipal corporation carry with them such other powers as are necessarily implied in or incident to such grants, and it also possesses all powers which are indispensable to the attainment and maintenance of its declared objects and purposes. Municipal corporations are more strictly limited in these respects than private corporations." 1 Andrews, *American Law*, § 402.

The express powers are found in the words of the charter or general statute of incorporation. The implied powers arise out of the language of the grant of express power. The necessary powers are such as are essential in order to effect the objects for which the corporation was created.² But it must be remembered that a municipal corporation is a body with special and limited jurisdiction, and that its powers can neither be extended nor diminished by its own acts.³ Thus, where a charter authorized a municipal board to act by a majority vote, a by-law providing that a two-thirds vote should be required was held invalid.⁴ In a somewhat similar case, where the charter was silent as to the number required to make a quorum of the city council, the court held that the common law rule which made a majority a quorum applied, or was impliedly intended by the charter, and that therefore the council could not fix the number by ordinance or resolution.⁵ The court said further that "in authorizing the city council to settle their rules of procedure, the legislature did not confer on the council the power to declare by rule what number of their body should constitute a quorum for the transaction of business. A mere majority of the members elected being present, the acts of the city council are valid, notwithstanding the existence of a rule adopted by the council requiring that two-thirds of the members elected shall be necessary to constitute a quorum. A municipal corporation cannot, by rule made by itself, either enlarge or diminish its own powers."

§ 26. Comments upon the rule.—The general principles as stated in the preceding section have been often approved by the courts. Thus Chief Justice Church said: "In this country all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant

² *Smith v. City of Newbern*, 70 N. C. 89; *City of St. Paul v. Traeger*, 25 C. 14, 16 Am. Rep. 766; *Bridge-Minn.* 252.

port v. Railroad Co., 15 Conn. 475; ⁴ *Short-Conrad Co. v. School District of Eau Claire*, 94 Wis. 535, 69 122 N. Y. 268, 25 N. E. 480, 19 Am. N. W. Rep. 337.
St. Rep. 490. ⁵ *Heiskell v. Mayor*, 65 Md. 125,

³ *City of St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 4 *Atl.* 116, 57 Am. Rep. 308.

could not be found in the language of their charters, we would deny them, in some cases the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And, therefore, it has long been an established principle of the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must have a choice of means adapted to ends and are not to be confined to any one mode of operation.”⁶ They can exercise no powers, said Chief Justice Shaw,⁷ “but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties and the accomplishment of the purposes of their association. This principle is fairly derived from the nature of corporations, and the mode in which they are organized and in which their affairs must be conducted.”

§ 27. Rules of construction.—“It is a well-settled rule of construction that in grants to corporations, whether public or private, only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by fair and reasonable implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.”⁸ All charters and city laws will, if possi-

⁶ *Bridgeport v. Railroad Co.*, 15 Conn. 475. But where the manner in which power is to be executed is expressly prescribed, that method must be followed. *Mayor of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Blanchard v. Hartwell*, 131 Cal. 263, 63 Pac. 349.

⁷ *Spaulding v. Lowell*, 23 Pick. 71.

⁸ *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 9 Am. St. 370; *Minturn v. Larue*, 23 How. 435; *Thomson v. Lee Co.*, 3 Wall. 327; *Thomas v. Richmond*, 12 Wall. 349; *Lehigh*

Water Company's Appeal, 102 Pa. St. 515; *Leonard v. Canton*, 35 Miss. 189; *Long v. Duluth*, 49 Minn. 287; *Brenham v. Brenham Water Co.*, 67 Tex. 542. With reference to this rule Judge Dillon says: “If upon the whole there be a fair, reasonable, substantial doubt whether the legislature intended to confer the authority in question, particularly if it refers to a matter extra-municipal or unusual in its nature, and the exercise of which will be attended by taxes, tolls, assessments or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or divest

ble, be construed in conformity to constitutional principles and in harmony with general laws.⁹

Two other cardinal rules of statutory interpretation, as modified to apply in construing the organic laws of public corporations, as well as of other governmental agencies, should be especially noticed.

First: An express specification of authority regarding a subject, excludes such broader authority as might otherwise have been deemed to flow from some other and more general provision, or be implied as incidental to the declared purposes of the enactment.¹⁰

Second: Where a grant of authority is made in respect to enumerated subjects or situations of the same nature, and the words which enumerate such subjects or situations are followed by words designating a broader or more extensive class, the final expression is presumed to be limited in meaning to the class the nature of which is indicated by the specific words.¹¹

§ 28. Usage.—In this country power cannot be conferred upon public corporations by usage, but usage may properly be considered in aid of construction.¹² Thus, an unlawful ex-

them of their property, the doubt should be resolved in favor of the citizen and against the municipality." Municipal Corporations, § 91, note, citing *Ex parte* Mayor of Florence, 78 Ala. 419; *Grand Rapids Electric Co. v. Grand Rapids Edison Co.*, 33 Fed. 659; *Logan v. Pyne*, 43 Iowa, 524, 22 Am. Rep. 261; *Anderson v. Wellington*, 40 Kan. 173, 10 Am. St. 175, note. In *Ex parte* Garza, 28 Tex. Ap. 381, 19 Am. St. 845, it was said that all reasonable intendment in support of the validity of an ordinance should be indulged.

⁹ *In re* Frazee, 63 Mich. 396, 6 Am. St. 310; *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572.

¹⁰ *State v. Trenton*, 38 N. J. L. 279.

64. "Whether the expression of one thing is to operate as the exclusion of another, is clearly a mere question of intention, to be gathered from the statute by the usual means and rules of interpretation. As an auxiliary rule, the maxim *expressio unius*, etc., as above defined, becomes a most important aid. It means that the special mention of one thing indicates that it was not intended to be covered by a general provision which would otherwise include it." Endlich, Interpretation of Statutes, § 399.

¹¹ *Butler's Appeal*, 73 Pa. St. 448; *St. Louis v. Laughlin*, 49 Mo. 559; *State v. McGarry*, 21 Wis. 496.

¹² *Frazier v. Warfield*, 13 Md.

penditure of money by a town cannot be made valid by usage however long continued. "Abuses of power and violations of right derive no sanction from time or custom."¹³

§ 29. **Manner of granting powers.**—It must be remembered that public corporations are created by the state for the primary purpose of aiding in the work of government; and that it delegates to them such powers as are deemed advisable for that purpose. Municipal corporations have largely lost their original character, and become, like counties and towns, essentially public agencies, with certain *quasi*-private powers and franchises, however, to be used for the special benefit of its citizens. It is impracticable for any charter to contain an enumeration of all the powers which it may be advisable that such a corporation should exercise under all possible future conditions. Hence, it has become customary to apply to the legislature for additional powers upon the occurrence of every new demand. As a result there is no such systematic classification of corporate powers as probably would have been made under a system where power is granted in general terms, as is common in many European countries. Thus, in France, all municipal power is derived from the simple provision that "the municipality regulates by its deliberations the affairs of the commonwealth."¹⁴

An examination of the laws of the several states and of the special charters of municipal corporations will show that many powers are common to all. Municipal corporations are in many states classified by general laws according to population, and a grant of enumerated powers is then made by such laws to each class. Cities of the highest class naturally require and ordinarily possess many powers and privileges not granted to smaller corporations.

Municipal corporations are generally granted power to manage and control the finances and property of the city, and to make proper ordinances for the government and good order of the city, the suppression of vice and intemperance, and the prevention of crime. For these purposes they are authorized to

¹³ Hood v. Lynn, 1 Allen, 103. Willard v. Newburyport, 12 Pick. 227; (town-house) Spaulding v. England towns are enabled to care Lowell, 23 Pick. 71. And see Tor-
for, are defined by original usage, rent v. Muskegon, 47 Mich. 115.
impliedly confirmed, in general ¹⁴ Goodnow, Municipal Problems,
terms, by statute. (Town-clocks) p. 252.

enact ordinances licensing amusements, prohibiting gaming, establishing boards of health and public markets, providing for a standard of weights and measures, a system of quarantine, taxing animals running at large, abating nuisances, regulating driving, slaughter-houses, butcher shops and various other occupations.

The powers of counties and townships vary according to locality. In the western states, where the powers are divided between the two bodies, the county ordinarily has power to sue and be sued, to purchase and hold real and personal estate for the use of the county, lands sold for taxes, and under judicial proceedings in which the county is plaintiff, to sell and convey real and personal estate owned by the county, and to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.

Often duties are laid upon public corporations by mandatory statutes. Examples are found in the duty to repair streets or to support the poor which are often expressly imposed upon cities and towns.

§ 30. General-welfare clause.—In addition to the grant of specific powers, most charters contain a clause granting power to provide for the preservation and promotion of the public welfare, and the peace and safety of the community. This provision is generally given a liberal construction, and under it ordinances have been enacted regulating the blasting of rocks, street preaching, destruction of trees in public places, and other such purposes.¹⁵ It is generally held that, in the absence of statute or charter provision requiring a different interpretation, the general-welfare clause will authorize a corporation to restrain animals from running at large.¹⁶ The mere fact that the charters of some cities in a state contain express provision authorizing the enactment of ordinances for this purpose, and that no such provision is contained in other charters, does not in itself prevent the latter cities from enacting such ordinances under the general-welfare clause.¹⁷

¹⁵ *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174; *Commonwealth v. Davis*, 140 Mass. 485; *State v. Merrill*, 37 Me. 329.

¹⁶ *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625; *Hagerstown v. Witmer*, 86 Md. 293, 37 Atl. 965,

39 L. R. A. 649, and note at p. 674 where the cases are collected. *Contra*, *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465.

¹⁷ *Cochrane v. Frostburg*, 81 Md. 54, 27 L. R. A. 728.

§ 31. The exercise of power beyond boundaries.—As a general rule a corporation cannot exercise its powers beyond its corporate limits.¹⁸ But authority to do so may be conferred by statute based upon a public necessity,¹⁹ as where a city is authorized to construct water-works at a distance beyond its limits. Under a charter containing general authority over drainage, the city may enter into contracts for or prosecute work beyond its limits for the purpose of discharging sewage where it will not endanger the health of the community.²⁰ So a city may by ordinance require that an applicant for milk license shall consent that the dairy herd from which he obtains his milk may be inspected by the commissioner of health, although the herd is kept outside of the city limits.²¹

§ 32. Statutory requirements as to form.—When the manner in which the power of a public corporation may be exercised is prescribed by the charter, that mode is the measure of power and must be strictly followed. “When any power is granted and the mode of its exercise prescribed, that mode must be strictly pursued.”²² Thus, a contract executed in a manner other than that prescribed by the statute is void.²³

§ 33. Constitutional principles limiting powers of government apply to public corporations.—A public corporation cannot derive from legislative grant any greater power than the legislative itself can exercise. It is restricted, in the exercise of its authority, by the constitutional provisions which apply as

¹⁸ *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *Elkhart v. Lipschitz*, 164 Ind. 671, 74 N. E. 528; *Donable v. Harrisonburg*, 104 Va. 533, 52 S. E. 174, 113 Am. St. 1056, 2 L. R. A. (N. S.) 910.

¹⁹ *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. See 1 Andrews, Am. Law, § 405.

²⁰ *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; and see *Shawneetown v. Baker*, 85 Ill. 563.

²¹ *State v. Nelson*, 66 Minn. 166,

68 N. W. 1066, 34 L. R. A. 318.

²² *Whiting v. West Point*, 88 Va. 905, 15 L. R. A. 861; *Minturn v. Larue*, 23 How. (U. S.) 435.

²³ *Fones Bros. H. Co. v. Erb*, 54 Ark. 645, 13 L. R. A. 353; *Cordilla v. Pueblo*, 34 Colo. 293, 82 Pac. 594; *Mazet v. Pittsburgh*, 137 Pa. St. 548; *Mueller v. Eau Claire Co.*, 108 Wis. 304, 84 N. W. 430; *Wheeler v. Wayne Co.*, 132 Ill. 599, 24 N. E. 625; *Weitz v. Independent District*, 79 Iowa, 423; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Niles W. W. v. Niles*, 59 Mich. 311.

general limitations upon the legislative and governmental power of the state. In appropriating money it is bound by the general restrictions on the taxing power. It cannot, for example, spend money or issue bonds to aid a private enterprise, even though the enterprise would result in increased commercial prosperity to its inhabitants.²⁴ It cannot construct a public building for the use of a private association.²⁵ It cannot take property, or appropriate public property, for private use;²⁶ nor take property for public use without the consent of the owner except under authority to exercise the right of eminent domain.²⁷ Its ordinances must not exceed the police power of the state;²⁸ must be equal and not discriminating;²⁹ must not interfere with interstate commerce;³⁰ or conflict with federal statutes. Statutes authorizing measures of these kinds are unconstitutional, and do not enlarge the authority.³¹

²⁴ See *infra*, § 230. *Loan Assn. v. Topeka*, 20 Wall. 655; *Lowell v. Boston*, 111 Mass. 454. "The taxing power of the city, like that of the state, must be for public purposes—maintenance of schools, libraries, sewers, public watering-troughs, city lockups, city hall, and all the various essentials or conveniences reasonably necessary for the management of municipal affairs—and may be provided for out of the general fund." 1 Andrews, *American Law*, § 411.

²⁵ *Kingman v. Brockton*, 153 Mass. 255.

²⁶ *Proprietors of Mt. Hope Cemetery v. Boston*, 158 Mass. 509.

²⁷ *Sheldon v. Kalamazoo*, 24 Mich. 383.

²⁸ *Chicago v. Gunning System*, 214 Ill. 628.

²⁹ *Brown v. Judge of Sup. Ct.*, 145 Mich. 413; *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32; *Strauss v. Galesburg*, 203 Ill. 234.

³⁰ *Muskegon v. Zeeryp*, 134 Mich. 181; *Marshalltown v. Blum*, 58 Ia. 184, 12 N. W. 266, 43 Am. Rep. 116.

³¹ *Kingman v. Brockton*, *supra*.

CHAPTER IV.

POWER TO CONTRACT AND OWN PROPERTY.

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| <p>§ 34. Power to incur debts.
35. Power to borrow money.
36. Power to make ordinary contracts.
37. Letting contracts to lowest bidder.
38. Remedy of bidder.
39. Ratification of invalid contracts.</p> | <p>§ 40. Paying money when not legally liable.
41. Indemnifying officers.
42. Compromise and arbitration.
43. Power to own property.
44. Power to acquire by gift: trusts.
45. Different classes of municipal property.</p> |
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§ 34. Power to incur debts.—The power to contract on credit—to incur debts—is an incidental or implied power of a public corporation, except under extraordinary provisions. The corporation may also give evidences or vouchers of indebtedness, such as notes and bonds, and will be bound by the same, although, as we shall see, they will not ordinarily have the character of commercial paper.¹

§ 35. Power to borrow money.—In the absence of some special authority, a public corporation has no power to borrow money.² The authority may be expressly given; or it may result from some express authority which necessarily implies it. Under the latter rule it is not sufficient that it is convenient to borrow in order to carry out the authority given; the borrowing of funds must be so essentially connected therewith as that it may be said to have been contemplated as proper by the legislature.³

§ 36. Power to make ordinary contracts.—Unless restricted by its charter, a municipal corporation has a general implied power to make such contracts as are reasonably necessary for the

¹ *Ketchum v. Buffalo*, 14 N. Y. 356. See § 216, *infra*. *Mills v. Gleason*, 11 Wis. 470; *Lovejoy v. Foxcroft*, 91 Me. 367, 40 Atl.

² *Mayor v. Ray*, 19 Wall. (U. S.) 141. ³ *Wells v. Salina*, 119 N. Y. 280, 8 So. R. 30, 9 L. R. A. 497. *Contra*, 23 N. E. 870, 7 L. R. A. 799.

purpose of carrying into effect the objects of its creation.⁴ A municipal corporation can bind itself only by such contracts as are reasonably within its purposes, and there is no estoppel against it to deny the validity of a contract which is beyond such purposes, or which has been made in violation of charter requirements.⁵

When a city, in the exercise of its governmental powers, and of its discretion as to time and manner, decides to make a certain improvement, the contracts made for the purpose of carrying on the work cannot be revoked by the corporation. An attempted revocation on the ground that the city attorney had advised that the ordinance authorizing the work was invalid is no defense to an action on the contract.⁶

§ 37. Letting contracts to lowest bidder.—Where a city charter does not prescribe the mode of entering into contracts for improvements, or the purchase of materials, and the city council does not abuse its discretionary powers, and does not act fraudulently, it may award contracts without letting them to the lowest bidder, if the contract is otherwise within the scope of its corporate power.⁷ But when the charter requires that such contracts

⁴ *Douglass v. Virginia City*, 5 Nev. 122; *East St. Louis v. East St. Louis Gas L. Co.*, 98 Ill. 415. (Power of local board to give sealed instrument) *Peterson v. New York*, 194 N. Y. 437.

⁵ *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830. "The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations." *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406. And see 1 Andrews, *American Law*, § 384.

⁶ *Safety Ins. W. & O. Co. v. Mayor of Baltimore (C. C. A.)*, 66 Fed. 140. An ordinance which attempts to revoke or to violate a valid contract of the corporation is a law impairing the obligation of a contract within the meaning of the United States Constitution. *American Water Works etc. Co. v. Home*

Water Co., 115 Fed. 171; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1.

⁷ *Yarnold v. City of Lawrence*, 15 Kan. 126; *Elliott v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081. In the case last cited the court said: "But the power of a city council is not unlimited. However difficult it might be to investigate the motives of the members of a city council, yet whenever they undertake to use their corporate powers fraudulently for their own advantage or for the benefit or injury of others, such acts are void. Any other rule would be disastrous, and the most salutary doctrine that can be upheld, and which we uphold as the law, is to allow fraudulent contracts on the part of municipal corporations to be impeached."

shall be let to the lowest bidder, a contract let in any other manner is invalid.⁸ When the right is properly reserved to reject any and all bids, it is equivalent to an offer to contract, and a bidder acquires no rights until his bid is actually accepted.⁹ The advertisement for bids must be in such form as to permit of *bona fide* competitive bidding.¹⁰ Charter provisions ordinarily require that the contract shall be let to the lowest responsible bidder. A certain discretion is, by such a provision, left to the awarding officers, which will not be controlled by the courts. The judgment and skill of the bidder, as well as his financial standing, may be considered by the awarding officers.¹¹

⁸ *Brady v. Mayor etc. of New York*, 20 N. Y. 312; *People v. Flag*, 17 N. Y. 584; *Breevort v. Detroit*, 24 Mich. 322; *Fones H. Co. v. Erb*, 54 Ark. 645, 17 S. W. 7; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Frame v. Felix*, 167 Pa. St. 47, 27 L. R. A. 802; *Weltz v. Independent District*, 79 Iowa, 423, 44 N. W. 696. See *Crabtree v. Gibson*, 78 Ga. 280, 3 S. E. 10.

⁹ *Anderson v. Board*, 122 Mo. 61, 26 L. R. A. 707, and note; *Stanley-Taylor Co. v. Supervisors*, 135 Cal. 486, 67 Pac. 783.

¹⁰ *Mazet v. Pittsburgh*, 137 Pa. St. 548; *Ely v. Grand Rapids*, 84 Mich. 337; *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22.

¹¹ *Kelly v. Chicago*, 62 Ill. 279; *Douglass v. Commonwealth*, 108 Pa. St. 559; *State v. M'Grath*, 91 Mo. 386; *State v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *Hoole v. Kinkead*, 16 Nev. 217; *Johnson v. Sanitary Dist. of Chicago*, 163 Ill. 285, 45 N. E. 213. In *Frame v. Felix*, 167 Pa. St. 47, the court said: "The provision that contracts for municipal work shall be given to the lowest responsible bidder does not have sole reference to the mere pecuniary liability of the contractor, but involves a discretion on the part of the municipal authorities in the selection of the agency best fitted

for the performance of the work required. *Commonwealth v. Mitchell*, 82 Pa. St. 343; *Findlay v. Pittsburgh*, id. 351; *Douglass v. Commonwealth*, 108 Pa. St. 559; *Interstate Vitrified Brick & Paving Co. v. Philadelphia*, 164 Pa. St. 477. But that discretion being granted, the purpose of the provision which was based upon motives of public economy, and originated perhaps from some degree of mistrust of the officers to whom the duty of making contracts for the public service was committed (*Brady v. New York*, 20 N. Y. 312), clearly was to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close as far as possible, every avenue to favoritism and fraud in its various forms (*Mazet v. Pittsburgh*, 137 Pa. St. 548), and to insure 'the accomplishment of the work at the lowest price by subjecting the contract for it to public competition.' In *re Mahan*, 20 Hun (N. Y.), 301. In order to effectuate this purpose it is manifest that where something is to be done that is required to be submitted to competition, every essential part of it that goes to make up the whole of it must be submitted to such competition."

§ 38. **Remedy of bidder.**—*Mandamus* or mandatory injunction to require the execution of the contract to the lowest bidder is generally refused on the ground that there is a discretion vested in the awarding officers, that there is an adequate remedy at law or that the provision is for the benefit of the public, and not the bidder.¹²

In a recent case ¹³ the circuit court of appeals said: "That tax-payers whose taxes are to be increased, or whose property is to be depreciated in value, by the fraudulent or arbitrary violation of this provision by the officers of a municipality, may maintain a bill to enjoin their proposed action, is a proposition now too well settled to admit of question.¹⁴ These suits, however, stand upon the ground that the statutes on which they are based were enacted, and the duties there specified were imposed upon the public officers, for the express benefit of the tax-payers and property holders who bring the suits. The appellee pays no taxes for this paving. He has no property which will be injured by the violation of the provisions relied upon, and no one who has is here to complain of their violation. So far as the purpose of the enactment is concerned, the complainant is a stranger to the statute—one whose interests were not considered, or intended to be considered, by the enactment. He is a mere bidder for some of the public work of this city, a contractor, or one who desires to become a contractor. * * * It is upon this principle that it is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of *mandamus* to force the officers of a municipality to enter into a contract with him."¹⁵ Nor can he maintain an action at law for damages for the refusal to enter

¹² *Dibble v. New Haven*, 56 Conn. 190; *State v. Fond du Lac Board of Education*, 24 Wis. 683; *People v. Campbell*, 72 N. Y. 496. *Contra*, *State v. Marion Co. Com'rs*, 39 Ohio St. 188; *Times Pub. Co. v. Everett*, 9 Wash. 518 (1894), 37 Pac. 695, 43 Am. St. Rep. 865. See annotation to *Anderson v. Board*, in 28 L. R. A. 707, 122 Mo. 61.

¹³ *Colorado Pav. Co. v. Murphy*, 78 Fed. 28.

¹⁴ *Times Pub. Co. v. Everett*, 9

Wash. 518, 37 Pac. 695; 1 Beach, Pub. Corp., § 634; 2 High, Inj., § 1251; *Mayor v. Keyser*, 72 Md. 106, 19 Atl. 706; *People v. Dwyer*, 90 N. Y. 402.

¹⁵ High, Extr. Rem., § 92; *State v. Board*, 24 Wis. 683; *Commonwealth v. Mitchell*, 82 Pa. St. 343; *Kelly v. Chicago*, 62 Ill. 279; *State v. McGrath*, 91 Mo. 386; *Douglass v. Commonwealth*, 108 Pa. St. 559; *Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337.

into the contract.¹⁶ "This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat one particular cause of action, but to defeat the right to any relief."¹⁷ The bidder has no remedy in the absence of a mandatory statute or when the right to reject is reserved.¹⁸ But when the bid is rejected upon grounds not within the province of the board to pass upon,¹⁹ or when the officers act fraudulently,²⁰ the rights of the lowest bidder will be protected. A bidder whose bid is fraudulent,²¹ obscure, or so framed as to prevent competition, is not entitled to the contract.²²

§ 39. Ratification of invalid contracts.—Where a contract made on behalf of a public corporation by one of its officers, or by an agent, is avoidable as against the corporation only because of fraud or because the officer had no authority from the corporation to make it, the contract may be ratified by the corporate authority which had power to authorize the transaction originally.²³ Usually a ratification will not be inferred or result from mere silence of the members of a governing body, with knowledge, even in some cases where there would be held to have been a ratification by acquiescence if the corporation were a private one. The ratification must be by affirmative action of the body acting officially; as by appropriating the consideration of the contract, or otherwise expressly recognizing without repudiating it.²⁴

¹⁶ *Talbot Pav. Co. v. City of Detroit*, 109 Mich. 657, 67 N. W. 979; *Gas Light Co. v. Donnelly*, 93 N. Y. 557.

¹⁷ *Colorado Pav. Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630.

¹⁸ *State v. Lincoln Co.*, 35 Neb. 346; *State v. Dickson Co.*, 24 Neb. 106.

¹⁹ *Cleveland etc. Tel. Co. v. Metropolitan Fire Com.*, 55 Barb. (N. Y.) 288.

²⁰ *State v. Trenton*, 49 N. J. L. 339, 12 Atl. 902.

²¹ *Baltimore v. Keyser*, 72 Md. 106; *State v. York Co. Com.*, 13 Neb. 57.

²² *Fones Bros. H. Co. v. Erb*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353; *Mazet v. Pittsburgh*, 137 Pa. St. 548; *Coggeshall v. Des Moines*, 78 Iowa, 235; *In re Anderson*, 109 N. Y. 554; *Little v. Jayne*, 124 Ill. 123. See *Nash v. St. Paul*, 11 Minn. 174.

²³ *Findlay v. Pertz*, 66 Fed. 427, 31 C. C. A. 340; *Backman v. Charlestown*, 42 N. H. 125; *People v. Swift*, 31 Cal. 26; *Howe v. Keeler*, 27 Conn. 538; *Shawneetown v. Baker*, 85 Ill. 563.

²⁴ *Agawam National Bank v. So. Hadley*, 128 Mass. 503; *Otis v. Stockton*, 76 Me. 506.

Ratification cannot arise solely from the acts of corporate officers who could not have authorized the contract at its inception; for example, from payments by a city treasurer upon a corporate contract.²⁵ And no contract can be ratified which was beyond the power of the corporation to make originally, either because of the subject-matter,²⁶ or because statutory formalities were not complied with.²⁷ Thus, if a statute required that a contract be made only after advertisement and bidding and with the lowest responsible bidder, a contract made by municipal officers without compliance with the provision cannot be ratified.²⁸ In such cases, the legislature can cure the defect by a validating though retroactive statute, provided the purpose of the contract be a constitutional one.²⁹

§ 40. Paying money when not legally liable.—A public corporation is not bound to refer one who has a disputable claim against it to the courts and require litigation; if benefit has accrued to the corporation for a corporate purpose, its authorities may pay the claim, if, in their judgment, it is better to do so. A tax levied to raise the money will be valid.³⁰

So a municipal corporation may pay money for a benefit received, which supports a moral or equitable obligation against it, though there be no legal ground for urging a liability, provided the benefit concerns some object not *ultra vires*, and be sufficient

²⁵ *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

²⁶ *Lewis v. Shreveport*, 108 U. S. 282; *Hodges v. Buffalo*, 2 Denio, 110.

²⁷ *Marsh v. Fulton Co.*, 10 Wall. 676.

²⁸ *Brady v. Mayor etc., of New York*, 20 N. Y. 312; *Zottman v. San Francisco*, 20 Cal. 96. Compare, if the requirement were by ordinance.

²⁹ *Winn v. Macon*, 21 Ga. 275; *Lockhart v. Troy*, 48 Ala. 579; *Keithsburg v. Frick*, 34 Ill. 405; *Mills v. Charleston*, 29 Wis. 400.

³⁰ "Here was a debt disputable, perhaps, but returned as a debt by the legally appointed commissioner, part of which, and a part which

was supposed to represent the whole, had been judicially held valid. Under these circumstances shall the town, liable to pay the largest portion, be compelled, at a large expense, to litigate and obtain a judgment of court upon each item before it can enforce a tax upon its inhabitants for its payment? We think not. They would clearly have the right to settle this as any other disputed claim against them, thus saving the cost, vexation and uncertainty necessarily attendant upon litigation; provided of course, that it is done in good faith and in the exercise of sound discretion." *Vose v. Frankfort*, 64 Me. 299.

to support taxation.³¹ The line of discretion is crossed where the payment becomes a mere gift of public money for private use, which is always unlawful.³²

§ 41. Indemnifying officers.—Municipal corporations have power to indemnify their officers for expenses or liabilities incurred in accomplishing the corporate purposes. A town may reimburse tax-assessors for money paid by them to tax-payers, to acquit themselves of liability incurred in collecting taxes upon an irregular assessment, where the money has been legitimately used by the town.³³ A town may reimburse the members of its school board for money paid in defending themselves against an action for libel, founded on their annual report.³⁴ But a corporation can indemnify or reimburse its officers under this principle only when the duty which entailed the loss related to corporate purposes or interests. In the first illustration above, the town could not pay to the assessors the amount of state taxes included in the illegal assessment, which had been turned over to the state.³⁵

³¹ *Bean v. Jay*, 23 Me. 117; *Friend v. Gilbert*, 108 Mass. 408; *Curran v. Holliston*, 130 Mass. 272.

³² *People v. Parker*, 231 Ill. 478.

³³ *Nelson v. Milford*, 7 Pick. 18.

³⁴ *Fuller v. Groton*, 11 Gray, 340.

³⁵ *Nelson v. Milford*, 7 Pick. 18; (but notice that in collecting the state taxes the assessors acted as independent public officers). See *Gregory v. Bridgeport*, 41 Conn. 76 (independent public officer), and cases cited.

In *Flood v. Leahy*, 183 Mass. 232, at 234, the court said: "The cases of *Vincent v. Nantucket* (12 Cush. 103), and *Fuller v. Groton*, 11 Gray, 340, when contrasted with each other, furnish a good illustration of the application of the rule which has been followed in construing the statute [authorizing appropriation of money for corporate purposes]. In the first case it was held that the town was not bound by its corporate vote to pay the expenses incurred by a field-driver in defend-

ing a suit brought against him for taking up and impounding cattle running at large contrary to law. The ground of the decision was that 'in relation to field-drivers, the whole corporate power of a town is exercised and exhausted in their election. It has afterwards no guardianship, control, or authority over them,' and they are not acting in relation to any corporate duty imposed upon the town. In the second case, an appropriation by a town to pay the expenses incurred by members of the school committee in defending a suit brought against them for an alleged libel contained in their annual report was held valid, upon the ground that there was imposed upon the town the corporate duty to raise money for the support of the schools, to choose a committee to superintend them, and through the committee to make an annual report of their condition."

§ 42. Compromise and arbitration.—A municipal corporation may take a note in payment of a claim; ³⁶ or may compromise a claim which seems doubtful, or submit it to arbitration.³⁷

But where a method for the collection or adjustment of a claim is prescribed by statute, that method excludes any implied discretion in the corporation to collect it or adjust it in other ways. A note cannot be taken in payment of taxes, where statutes provide for a sale of property for delinquent taxes.³⁸ Damages to land condemned for a street cannot be fixed by arbitration, where a statute sets out the procedure for awarding damages.³⁹ The express provision is exclusive.

Power to compromise or submit to arbitration cannot be used to shield a bare gift; there must have been, at least, a disputable claim.⁴⁰

§ 43. Power to own property.—Usually a public corporation of general powers is expressly authorized to take and hold property; the authority to do so would be implied from the incorporation alone. As a means to support the exercise of this general power, the corporation is granted a general power of taxation. In addition, it is usually authorized to exercise the right of eminent domain.

A general authority to purchase property, either with money raised by taxation or in the exercise of the right of eminent domain, is limited, however, to the declared purposes of the corporation, to which purposes it is merely auxiliary and incidental.⁴¹

³⁶ *Buffalo v. Bettinger*, 76 N. Y. 393.

³⁷ *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230; *Matthews v. Westboro*, 131 Mass. 521; *Shawneetown v. Baker*, 85 Ill. 563; *Kane v. Fond du Lac*, 40 Wis. 495; *Dix v. Dummerston*, 19 Vt. 263; *Paret v. Bayonne*, 39 N. J. L. 559; *Springfield v. Walker*, 42 Oh. St. 543.

³⁸ (Dicta) *Buffalo v. Bettinger*, 76 N. Y. 393.

³⁹ *Somerville v. Dickerman*, 127 Mass. 272.

⁴⁰ *People v. Parker*, 231 Ill. 478.

⁴¹ "In the absence of express prohibitory statutes, or of statutes which in terms confer and limit, and therefore define and measure, the power, the capacity to acquire and hold property, real or personal, must be fairly incidental to some power expressly granted or absolutely indispensable to the declared purposes of the corporation. Any greater right than this is not only not granted, but is impliedly denied." 2 Dillon, *Municipal Corporations* (4th ed.), § 561.

A public corporation cannot purchase property merely because the acquisition of it will indirectly yield some pecuniary or commercial advantage to its citizens as individuals.⁴² So a power to purchase real estate "for the use, convenience and improvement of the city" does not enable the city to buy land to be used as fair grounds by a private corporation, even though the holding of annual fairs would bring collateral advantages to the municipality and to its citizens.⁴³

Express authority to establish a specified municipal work or institution which requires property, necessarily implies authority to procure the property therefor. Authority to maintain public schools will authorize the purchase of land on which to construct a school-house.⁴⁴ Authority to establish markets includes authority to purchase the land for a market-house.⁴⁵

A municipal corporation may, of course, exercise a business discretion as to whether it will purchase property outright or lease it; provided charter or statute does not direct that it obtain property for the particular purpose in some designated way.⁴⁶

§ 44. Power to acquire by gift: to administer trusts.—Although authority to acquire property by purchase, which involves the use of the taxing power, extends only to property which is reasonably necessary for some purpose positively authorized, or some duty affirmatively enjoined, a municipal corporation has a general implied power to receive property by gift. This is involved in its general power to *own* property. That power is unlimited, as concerns the mere passive receiving and holding of property for value or income.⁴⁷ A city may even acquire lands by adverse possession.⁴⁸ Before the practice of granting the taxing power to such corporations became prevalent, their expenses were largely defrayed from property obtained by grants.

Municipal corporations have a general power, also the result of

⁴² *Bussey v. Gilmore*, 3 Me. 191; *Place v. Providence*, 12 R. I. 1.

⁴³ *Eufalie v. McNab*, 67 Ala. 588, 42 Am. Rep. 118.

⁴⁴ *Tacoma v. Tacoma L. and W. Co.* 15 Wash. 499, 46 Pac. 1119.

⁴⁵ *Ketchum v. Buffalo*, 14 N. Y. 356.

⁴⁶ (Lease of rooms for offices) *Davies v. New York*, 83 N. Y. 207.

⁴⁷ *Coggeshall v. Pelton*, 7 Johns. ch. 292; *Hamden v. Rice*, 24 Conn. 350. The power to alienate or let property is considered later.

⁴⁸ *New Shoreham v. Ball*, 14 R. I. 566.

colonial usage, to take and administer trusts for any public or charitable purpose, for the benefit of their inhabitants.⁴⁹

§ 45. **Different classes of municipal property.**—If the acquisition of property by a public corporation by purchase is but auxiliary to the accomplishing of some authorized corporate purpose, the powers and liabilities of the corporation in respect to given property depend on the nature of the purpose for which it is employed. Property held for state purposes have the characteristics of public property in general. But municipal corporations are authorized to conduct works which, though for a service public in its nature, are yet voluntary with the corporation, and maintained by it to satisfy the local needs of its citizens, as a separate community, rather than in pursuance of an object of state government. Such works, because of these characteristics, are often referred to as private or corporate, and the property as private or corporate property. Such terms are confusing; but the distinction is important, especially in connection with questions of alienation, legislative control, and liability for torts.⁵⁰

⁴⁹ *McDonogh's Ex'r v. Murdoch*, 15 How. 367; *Vidal v. Girard's Admrs.* 2 How., at 186; *Chambers v. St. Louis*, 29 Mo. 543; *Perin v. Carey*, 24 How. 645. "But municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands *in trust for any object or matter foreign to the purpose* for which they are created, and in which they have no interest. Thus, while the supervisors of a *county*, who are made, by statute, a corporation for special purposes may take by grant a parcel of land in trust that they should erect a *court-house and jail*,

these being county purposes, they cannot be seized as trustees for the use of an individual, or in trust for building a church or school-house for the use of the inhabitants of a *particular town* in the county. So a corporation, with authority to establish, in a designated town, an institution "for the instruction of youth," cannot be a trustee under a will or grant to hold funds and pay over the income thereof for the support of missionaries." 2 Dillon, *Municipal Corporations* (4th Ed.), § 573.

⁵⁰ For further reference to this distinction see *infra*, ch. XIX.

CHAPTER V.

POLICE POWER.

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| <p>§ 46. Nature and scope of the police power.</p> <p>47. Scope of power of municipality.</p> <p>48. Regulation of occupations and amusements.</p> <p>49. The preservation of health.</p> | <p>§ 50. Nuisances.</p> <p>51. Regulation of wharves.</p> <p>52. Licenses.</p> <p>53. Markets.</p> <p>54. Prevention of fires.</p> <p>55. Care of indigent and infirm.</p> |
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§ 46. Nature and scope of the police power.—The police power of government extends to a great variety of subjects, all having to do ultimately with the peace, safety, comfort, and prosperity of the public.

“Among the maxims of our law is that ‘regard for the public welfare is the highest law.’

“This maxim, coupled with the restrictive one against the individual that ‘you shall so conduct yourself and so enjoy your own as not to injure others,’ are the foundation maxims of the police power. * * *

“The present tendency and ultimate effect of relative conditions and conduct is the domain of proper governmental solicitude, and the legislative power may properly regulate the rights of individuals with reference to the present or ultimate effect upon the public. * * *

“‘The state police,’ says Mr. Justice Clifford, ‘in its widest sense comprehends the whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to every one the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others.’ ”¹

¹ Andrews, American Law, § 339. “We hold that the police power of a state embraces regulations designed to promote the public convenience and general prosperity as well as regulations designed to promote the public health, the public morals or the public safety.” (Drainage of swamp lands) C. B. & Q. R. v. Drainage Commrs., 200 U. S. 561, at 592.

The police power extends to the protection of the lives, persons and health of the people, and to the protection of all the property within the state. Any occupation which is of such a nature as to be liable to create a nuisance, unless subjected to special regulation, comes within the scope of its operation.² All property is held subject to its proper exercise.³ While a wide range of discretion must be left to the body exercising this power, it is necessarily limited by the purpose for which the power exists. Acts done under it must have some relation to the proper end. The rights of property cannot be invaded under a pretense of the police power, when it is apparent that the power is in fact sought to be used for a different purpose.⁴ The power must be exercised so as not to conflict with the constitutional rights of the people.⁵ The various powers which fall under the name of police powers are ordinarily specifically enumerated in statute or charter. In addition thereto, municipal charters commonly contain a general provision authorizing the exercise of powers necessary to preserve the peace and good order of the community and promote the public welfare. Much discretion must necessarily be left to the corporation; and it has been held that where a council is given power to make such regulations as it shall deem necessary and requisite for the security, welfare and convenience of the corpora-

² *Munn v. Illinois*, 94 U. S. 113; *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3; *State v. Orr*, 68 Conn. 101, 28 L. R. A. 279; *People v. Bennett*, 83 Mich. 457; *Bancroft v. Cambridge*, 126 Mass. 438; *Welsh v. Boston*, 126 Mass. 442, note; *Ogden City v. McLaughlin*, 5 Utah, 387, 16 Pac. 721; *Monroe v. City of Lawrence*, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380. A statute prohibiting any person from engaging in the business or occupation of fishing in the waters of the state for trout, with intent to sell or trade the fish, held to be a valid exercise of the police power. *State v. Dow*, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314. The business of hawking and ped-

dling is extensively regulated under the police power. *City of Alma v. Clow*, 146 Mich. 443, 109 N. W. 853.

³ *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81; *Comm. v. Sisson*, 189 Mass. 247, 75 N. E. 619; *Health Dept. v. Rector*, 145 N. Y. 32, 27 L. R. A. 710.

⁴ *Chaddock v. Day*, 75 Mich. 527, 13 Am. St. Rep. 468; *Ex parte Tuttle*, 91 Cal. 589; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79; *State v. Donaldson*, 41 Minn. 74.

⁵ *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *St. Louis v. Weber*, 44 Mo. 547; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727; *Leep v. St. Louis etc. R. Co.*, 58 Ark. 407, 23 L. R. A. 264.

tion, it has the right to judge as to what ordinances are necessary to preserve the health of the people of the municipality.⁶

§ 47. Scope of power of municipality.—It is often said that a municipal corporation acquires, by the grant in general terms of authority to enact police ordinances, the broad police power of the state.⁷ This is not quite true. A city council cannot legislate upon the offences of murder, assault and battery, adultery, and the like, or upon marriage and divorce, even where state laws do not cover the matter. Its power is limited by the purpose for which it is granted; that is, to regulations for peculiarly local needs; and it is doubtful if the legislature could constitutionally confer powers upon a local agency to regulate those matters of general public concern upon which constitutions contemplate uniformity of legislation throughout the state.⁸

The police power of a municipal corporation is usually considered as that of regulation; but it is sometimes, as we shall see, deemed to cover administrative measures.

Where the litigation in the following matters is under statute prohibitions, the question is as to the police power of the state; where it is under local ordinances, the questions are, first, whether the ordinance is within the police power of the state, second, whether it is within the terms of the particular grant of authority to the local agency.

§ 48. Regulation of occupations and amusements.—Neither the state nor municipalities can prohibit the prosecution of a harmless business; but it may subject all manner of occupations and amusements to such reasonable regulations as are necessary in order to protect the interests of the public. When the business or occupation is of such a character as to threaten possible injury to the public, it becomes subject to reasonable restrictions by virtue of the police power. But it is only for the purpose of pro-

⁶ *City of St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278; *Summerville v. Pressley*, 33 S. C. 56, 11 S. E. 545, 26 Am. St. 659, 8 L. R. A. 854; *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474, 8 Am. St. 544, note.

⁷ See *e. g.* *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, where it was considered that a grant of the entire police power of

the state arose from mere incorporation alone; that is, that incorporation carried an implied power to pass by-laws, which implied power comprised the general police power of sovereignty. See criticism in *Cristensen v. Fremont*, 45 Neb. 160, 63 N. W. 364.

⁸ See *Opinion of Justices*, 160 Mass. 586, 36 N. E. 488.

moting the public health, welfare and morals that such interferences with private rights will be upheld.⁹ Certain kinds of occupations which are illegal or immoral *per se*, such as gambling,¹⁰ may be prohibited; but an ordinance which authorizes the police to seize and destroy gambling implements without notice to the owner is void, because depriving the owner of his property without due process of law.¹¹ Occupations not intrinsically harmful can only be regulated. Thus, a city council may prohibit the carrying on of a laundry except in certain localities and during certain hours; but it cannot arbitrarily refuse to issue a license to run a laundry to a person without reference to the character or qualifications of the applicant.¹² So a city may prohibit the keeping of a house of ill-fame, and impose penalties upon the owners of a building leased for that purpose;¹³ but it cannot prohibit the leasing of a house to a prostitute simply as a place of residence.

Power to regulate a business must be exercised through the adoption of rules and regulations as to the manner in which it shall be conducted, and not by the municipality itself engaging in the business.¹⁴ The business of selling intoxicating liquors is a proper subject of police regulation.¹⁵ Thus, a city may by ordinance prohibit the sale of liquors and wines in places where musical or theatrical entertainments are given and where females attend as waitresses.¹⁶ So it may provide that cider shall not be sold in quantities of less than a gallon, or drunk on the premises.¹⁷ A wider discretion on the part of the corporation is recognized in respect to exhibitions and amusements than in the

⁹ *St. Louis v. Fitz*, 53 Mo. 582.

¹⁰ *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173.

¹¹ *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420.

¹² *Barbier v. Connolly*, 113 U. S. 27; *Yick Wo v. Hopkins*, 118 U. S. 358; *State v. Taft*, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122.

¹³ *McAlister v. Clark*, 33 Conn. 91. *Contra*, as to the owners of the premises merely permitting use for prostitution. *State v. Webber*, 107 N. C. 962, 12 S. E. 598, 22 Am. St. 920.

¹⁴ *Rippe v. Becker*, 56 Minn. 100, 22 L. R. A. 857.

¹⁵ *Crowley v. Christensen*, 137 U. S. 86. A general authority to regulate the liquor traffic gives authority to exclude it altogether from residential districts. *Greencastle v. Thompson*, 168 Ind. 493, 81 N. E. 497.

¹⁶ *Ex parte Hayes*, 98 Cal. 555, 20 L. R. A. 701.

¹⁷ *Monroe v. Lawrence*, 44 Kan. 607, 10 L. R. A. 520, 24 Pac. 1113.

case of trades and useful occupations; and a still wider discretion is allowed where the business is of such a nature as to be liable to degenerate into a nuisance, or tend to promote disorder and crime.¹⁸

§ 49. The preservation of health.—The protection of the health of the people is one of the principal purposes for which municipal corporations are created, and every presumption will be indulged in favor of an ordinance having this for its object.¹⁹ The instances in which this power has been exercised are innumerable. For illustration, a municipality may regulate slaughterhouses,²⁰ the burial of the dead,²¹ the cleaning and care of sinks and cesspools,²² the kind and quantity of certain products, such as rice, which may be cultivated within the corporation limits,²³ the sale of cigarettes.²⁴ So it may establish quarantine regulations,²⁵ and remove persons who are affected by a contagious disease, or who have been exposed to the same, to places of detention, and prevent communication with them.²⁶

A city may divert flowing water from land in order to protect

¹⁸ *Mankato v. Fowler*, 32 Minn. 364.

¹⁹ *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725.

²⁰ *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *St. Paul v. Byrnes*, 38 Minn. 176; *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; *The Slaughter House Cases*, 16 Wall. (U. S.) 36; *Butchers v. Crescent City*, 111 U. S. 746, 28 L. Ed. 585; *Beiling v. Evansville*, 144 Ind. 644, 42 N. E. Rep. 621, 35 L. R. A. 272.

²¹ *Bogert v. Indianapolis*, 13 Ind. 134; *Coates v. Mayor*, 7 Cow. (N. Y.) 585; *Ex parte Bohen*, 115 Cal. 372, 36 L. R. A. 618, 47 Pac. 55.

²² *Nicoulin v. Lowery*, 49 N. J. L. 391, 8 Atl. 513; *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. 1146.

²³ *Green v. Savannah*, 6 Ga. 1; *Summerville v. Pressley*, 33 S. C. 56.

²⁴ *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725.

²⁵ *Railway Co. v. Husen*, 95 U. S. 465; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; *Markham v. Brown*, 37 Ga. 277, and note to this case, 92 Am. Dec. 76, where the cases are collected; *Thomas v. Mason*, 39 W. Va. 526, 26 L. R. A. 727, and extensive note on powers and liabilities of municipalities in times of epidemics; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, and note on quarantine regulations by health authorities. Parties dealing in second-hand clothing may be required to disinfect it. *State v. Taft*, 118 N. C. 1190, 32 L. R. A. 122.

²⁶ *Harrison v. Baltimore*, 1 Gill (Md.), 264; *Clinton v. Clinton Co.*, 61 Iowa, 205, 16 N. W. 87; *Elliott v. Kalkaska Sup.*, 58 Mich. 452, 55 Am. Rep. 706, 25 N. W. 461.

public health, but not to supply a watering trough.²⁷ So a city may provide that an article of food, such as milk, which does not reach a prescribed standard,²⁸ or trees which have the contagious disease known as the "yellows,"²⁹ shall be destroyed without compensation to the owner. Every man holds his property under the implied obligation that it shall not be injurious to the community. "The exercise of the police power," said Mr. Justice Harlan, "by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a possessor of his property without due process of law."³⁰ An ordinance requiring venders of milk to furnish gratuitously, on application of sanitary inspectors, samples of milk not exceeding a half pint for inspection and analysis, is within the exercise of the general power in a municipal corporation to pass ordinances to preserve health.³¹ Although a corporation has power to prevent articles of merchandise or other things which have been used by persons or in places infected with contagious disease from being brought within its limits, establish quarantine and reasonable inspection regulations, and provide for disinfecting and destroying the germ of the dis-

²⁷ *Suffield v. Hathaway*, 44 Conn. 521.

²⁸ *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541.

²⁹ *State v. Main*, 69 Conn. 123, 36 L. R. A. 623, 37 Atl. 80 (1897). Mr. Justice Baldwin said: "A widespread apprehension throughout the community justifies itself, and is a sufficient basis for legislative action toward the removal of the cause, real or supposed, of the danger apprehended, where this cause is a deadly disease of a food-producing tree. *Bissell v. Davison*, 65 Conn. 183, 191, 32 Atl. 348. The destruction of the infected trees by order of a public official, after due inspection, is a remedy which, however severe, is one appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as

well as without any compensation to the owner for resulting loss." *State v. Wordin*, 56 Conn. 216; *Powell v. Pennsylvania*, 127 U. S. 678.

³⁰ *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541; *Taunton v. Taylor*, 116 Mass. 254; *Brown v. Keener*, 74 N. C. 714. Under a statutory power to prohibit or regulate offensive trades, a local board of health passed an order which prohibited the excavation, without a permit, of clay for making bricks, except upon land owned by a certain brick company. Held, invalid for unreasonableness. *Belmont v. New England Brick Co.*, 180 Mass. 442, 77 N. E. 504.

³¹ *State v. Dupaquier*, 46 La. Ann. 577, 26 L. R. A. 162, 15 So. 502, 49 Am. St. 334.

ease as far as practicable, it can go no further than is necessary in order to secure protection. Thus, it has no power to declare it unlawful to sell meat or other food, or to deal in second-hand or cast-off clothing.³² A lawful business, not in itself necessarily a nuisance, which may be conducted without danger to the community when properly regulated, cannot be prohibited.³³

§ 50. **Nuisances.**—Municipal corporations are ordinarily given power to abate nuisances. It can be exercised only when the act or thing is an actual nuisance, and its abatement required in order to preserve the health and safety of the community.³⁴ A corporation cannot make a thing a nuisance by merely saying that it is one.³⁵ “It is a doctrine not to be tolerated in this country,” said Mr. Justice Miller, “that a municipal corporation without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities.”³⁶ Ordinarily, there must be a judicial determination of

³² Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130.

³³ State v. Taft, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122.

³⁴ *Ex parte* Robinson, 30 Tex. App. 493, 17 S. W. 1057. See note 38 L. R. A. 305, where the cases are collected.

³⁵ Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524. *Ex parte* O’Leary, 65 Miss. 80, 7 Am. St. Rep. 640; Tissot v. Great South. Tel. Co., 39 La. Ann. 996, 4 Am. St. Rep. 248; State v. Mott, 61 Md. 297, 48 Am. Rep. 105; Cole v. Kegler, 64 Iowa, 59; Grossman v. Oakland, 30 Oregon, 478, 41 Pac. 5, 60 Am. St. 832, 36 L. R. A. 593 (and note on power of municipal corporation to define, prevent and abate nuisances); *Ex parte* Wygant, 39 Oregon, 429, 64 Pac. 867, 54 L. R. A. 636; Western etc. R. Co. v. Atlanta,

113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294. Power expressly conferred upon a city by statute to “declare what shall be a nuisance” does not give power to declare a thing to be a nuisance which is not one by nature, even though it might under certain circumstances become one. See also cases on the validity of ordinances against bill-boards. Passaic v. Paterson Bill Posting Co., 72 N. J. L. 285; Chicago v. Gunning System, 214 Ill. 628; compare, Rochester v. West, 164 N. Y. 510.

³⁶ Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984. See, also, St. Paul v. Gilfillan, 36 Minn. 298; (a legislature may define nuisances) Dingley v. Boston, 100 Mass. 544; Cole v. Kegler, 64 Iowa, 59; Everett v. Marquette, 53 Mich. 450. A legislature cannot declare that to be a nuisance which is not

the fact that the thing complained of is a nuisance, although the state may confer upon the municipality the power to abate nuisances summarily without formal legal proceedings.³⁷ The remedy must not be more stringent than the necessities of the case require. Thus, where the nuisance consists in the improper use of a building, a city cannot legally cause the building to be destroyed.³⁸ What constitutes a nuisance must depend upon the particular circumstances of the case. Thus, a structure or act may be a nuisance in a certain locality and not so in another. This is true of smoke, ringing of bells, blacksmith shop, sawing of marble, blasting of rocks, and the noise of a circus.³⁹ The ordinary remedy for the abatement of a nuisance is by indictment, although the municipality is also entitled to proceed by way of injunction in certain cases.⁴⁰

§ 51. Regulation of wharves.—A city may, under the police power, require that certain wharves and waters shall be used by

one in fact, if, by so doing, it infringes upon constitutional rights. *Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498. "An ordinance cannot transform into a nuisance an act or thing not treated as such by the statutory or common law." *Grossman v. Oakland*, *supra*. In this case an ordinance absolutely prohibiting a railroad company from inclosing its track in the platted portions of the city, and providing that such inclosure should be a nuisance, was held invalid, although the charter conferred power to declare what shall constitute a nuisance.

³⁷ *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. R. 830; *King v. Davenport*, 98 Ill. 305.

³⁸ *Czarnieck's Appeal* (Pa. St.), 11 Atl. 660; *Shepard v. People*, 40 Mich. 487.

³⁹ *Harmon v. Chicago*, 110 Ill. 400; *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49; *Davis v. Sawyer*, 133 Mass. 289; *Leete v. Pilgrim Church*, 14 Mo. App. 590; *Bowen v.*

Mauzy, 117 Ind. 258; *McKeon v. See*, 51 N. Y. 300; *Hunter v. Farren*, 127 Mass. 481; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388. The fact that the conditions constituting a nuisance are not the same at all times and places, and that esthetic ideas must sometimes be sacrificed to the demands of commerce, is thus expressed by Lord Justice James in *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes."

⁴⁰ *State v. Anwerda*, 40 Iowa, 151; *Ottumwa v. Chinn*, 75 Iowa, 405; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393; *Stearns Co. v. St. Cloud etc. Co.*, 36 Minn. 425.

certain classes of boats only. Such regulations do not deprive the owners of the wharves of their property without due process of law. They are valid because rendering more convenient and safe the transaction of business in the harbor.⁴¹

§ 52. **Licenses.**—Power to license occupations and amusements must be conferred expressly or by necessary inference, or it cannot be exercised by a municipal corporation.⁴² A license may be imposed either as a tax or as a police regulation.⁴³ When imposed as a tax, its validity is determined by the principles governing taxation. When imposed as a police regulation, it must be for the purpose of preventing some threatened evil, and must not exceed in amount a sum sufficient to cover the expenses of issuing the license and the expense of police supervision.⁴⁴ It may be required “for the purpose of insuring the proper police supervision, whenever the character of the trade or business is

⁴¹ *Cushing v. The John Frazer*, 21 How. (U. S.) 184, 16 L. ed. 106; *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447, where the right of a city to establish a public wharf without regard to the question whether a riparian owner has title to the land under water is fully discussed.

⁴² *State v. Itzkovitch*, 49 La. Ann. 366, 21 So. 544.

⁴³ *Banta v. Chicago*, 172 Ill. 204, 50 N. E. 233; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888.

⁴⁴ *Mankato v. Fowler*, 32 Minn. 364; *Von Baalen v. People*, 40 Mich. 258, 36 Am. Rep. 522, and authorities cited in note. But see *Kinsley v. Chicago*, 124 Ill. 359, 19 N. E. 260. In *Tomlinson v. Indianapolis*, 144 Ind. 142, 36 L. R. A. 413, the court said: “The only contention, in truth, which can be plausibly urged against the ordinance is that it charges those who drive upon the streets, but live outside the city limits, the same license fees charged against those who reside within the city; and we do not think that the ordinance can, for this reason, be

held invalid. The Common Council, as we have seen, is given by the statute power to pass ordinances ‘to regulate the use of streets and alleys by vehicles.’ This provision would of itself be sufficient authority to sustain the ordinance. The power to regulate implies the power to license and to exact a reasonable fee for such license. But the statute further expressly provides that the council may pass ordinances ‘to license, tax and regulate wheeled vehicles.’ This is a police power and not a taxing power. *Indianapolis v. Bieler*, 138 Ind. 30. The fee charged is but \$3 per year. Nor is it any objection to this conclusion that some revenue arises to the city from the fees collected, or that such revenue is applied to the repair of the streets. The streets are used, and in part worn out, and put in a condition needing repair, by the vehicles that are charged the license fee. See *Rochester v. Upham*, 19 Minn. 108 (Gil. 78); *State v. Cassidy*, 22 Minn. 321, 21 Am. Rep. 765.”

such that the absence of police supervision would occasion injury to the public dealing with those engaged therein, either because the trade requires a certain degree of skill and professional qualification, or because it furnishes abundant opportunities for the perpetration of fraud, which without police supervision, would very likely prove successful.”⁴⁵ As stated by Mr. Justice Mitchell,⁴⁶ “It is undoubtedly the law that the right to license must be plainly conferred or it will be held not to exist. The power to make by-laws relative to specified lawful occupations, or the general power to pass prudential by-laws in reference to them, would not as a general rule authorize the municipal corporation to exact a license from those carrying on such business. But in view of the very important bearing which the scavenger business has upon the public health, and the imperative necessity, from sanitary considerations, that such work should be intrusted only to those who are competent and properly equipped to perform it, we are of opinion that the grant of power to make such regulations and to ordain such ordinances as may be necessary and expedient for the preservation of health and to prevent the introduction of contagious diseases, conferred authority on the common council, as one means of regulating the scavenger business, to require a license from those carrying it on and to prohibit any one from doing so without a license.”⁴⁷

The power to tax is distinct from the police power. Its purpose is revenue, while police power is for the purpose of regulation. Thus, a license charge imposed on hackmen of forty dollars per year is clearly intended for the purpose of raising revenue, and not for the purpose of regulation, and hence cannot be sustained under the police power.⁴⁸ But an annual license fee of eight dollars, and the cost of numbering the hack, not ex-

⁴⁵ Tiedeman, *Limitations on Police Power*, § 101.

⁴⁶ *State v. McMahon*, 69 Minn. 265, 72 N. W. 79 (1897); *Ex parte Garza*, 28 Tex. App. 381, 19 Am. St. 845.

⁴⁷ *Boehm v. Baltimore*, 61 Md. 259; *Chicago etc. Co. v. Chicago*, 88 Ill. 221; *Kinsley v. Chicago*, 124 Ill. 359, 19 N. E. 260. Under a statute authorizing a city “to re-

strain hawking and peddling,” a city may require a license from peddlers. *South Bend v. Martin*, 142 Ind. 31, 29 L. L. A. 531. Authority to regulate pawnbrokers gives power to exact license fees from them. *Grand Rapids v. Brady*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, and see note.

⁴⁸ *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367.

ceeding twenty-five cents, is valid as a police regulation.⁴⁹ Under the police power a municipal corporation may, under proper authority, require a license from peddlers, hackmen, draymen, omnibus drivers, retail liquor dealers, showmen, green grocers, billiard saloons, pawnbrokers, milk dealers, livery-stable keepers, plumbers, bakers and auctioneers.⁵⁰ An ordinance providing for a peddler's license which discriminates against non-residents and goods not manufactured within the municipality is void as an attempt to regulate commerce.⁵¹ Power to license and regulate saloons will not authorize an ordinance forbidding the use of door screens and window blinds in the windows and openings of a saloon. Such an ordinance to be reasonable must be confined in its operations to such times as the saloon is not allowed to do business, as on Sundays and holidays.⁵² A city may be authorized to require a license for the use of the streets by vehicles without reference to their business.⁵³ So it may require a license from those engaged in a business which requires them to go from a place outside of the city to a place within the city, such as a stage or dray line,⁵⁴ but not when the coming to the city is only occasional.⁵⁵

§ 53. Markets.—The state commonly delegates to municipal corporations power to establish and regulate markets. This power is of a police nature and is designed to protect the health and

⁴⁹ *Ex parte* Gregory, 20 Tex. App. 210, 54 Am. Rep. 516.

⁵⁰ Schumann v. Ft. Wayne, 127 Ind. 109, 11 L. R. A. 378; Chicago v. Barte, 100 Ill. 57; People v. Wagner, 86 Mich. 594; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765. See State Centre v. Barenstein, 66 Iowa, 249; St. Paul v. Traeger, 25 Minn. 248; Barling v. West, 29 Wis. 307, 9 Am. R. 576. For a collection of cases and illustrations of ordinances imposing license fees, see State v. French, 17 Mont. 54, 30 L. R. A. 415, and note. As to the reasonableness of ordinances of that character, see § 157, and also English and American notes to the case of John v. Mayor of Congdon, 7 Eng. Rul. Cas. 278.

⁵¹ Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Marshalltown v. Bloom. 43 Am. Rep. 116, 58 Iowa, 184. See State v. Wheelock, 95 Iowa, 577, 30 L. R. A. 429.

⁵² Champer v. Greencastle, 138 Ind. 339. Statutes having the same object as the above ordinance have been considered valid. Comm. v. Casey, 134 Mass. 194; Comm. v. Brothers, 158 Mass. 200.

⁵³ Tomlinson v. Indianapolis, 144 Ind. 142. See cases collected in a note to this case in 36 L. R. A. 413.

⁵⁴ Sacramento v. California Stage Co., 12 Cal. 134.

⁵⁵ East St. Louis v. Bux, 43 Ill. App. 276. See Cary v. North Plainfield, 49 N. J. L. 110.

well-being of the community. A market "is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale. They have been found to be a public convenience when properly regulated. Such regulations as the city authorities may adopt in regard to them should have and generally have reference to the preservation of peace and good order and the health of the city. They should be of a police and sanitary character, and an attempt by color of regulations to restrain trade is an abuse of the power."⁵⁶ The market may be placed under the general supervision of the police or of an officer specially appointed for that purpose. Those enjoying market privileges may be required to pay a license therefor.⁵⁷ Under power to establish and regulate markets, a city may prohibit the sale of certain articles, such as oysters or beef, at any place other than the market during market hours.⁵⁸ But the authority to prohibit the "sale of vegetables during market hours" will not authorize the prohibition of such sales at other times.⁵⁹ Power to establish and regulate markets carries with it power to purchase a site and erect the necessary buildings thereon.⁶⁰ Such power will not authorize the construction of a market building in a public street.⁶¹ But when a city establishes a market in a portion of a public street duly condemned for that purpose, the owners of abutting property have no right of action against the city for damages caused thereby.⁶² An ordinance which deprive the producers of market articles of their own rais-

⁵⁶ *Caldwell v. City of Alton*, 33 Ill. 416, 85 Am. Dec. 282, and note citing many cases. See, also, *Wartman v. City of Philadelphia*, 33 Pa. St. 202; *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563; *Robinson v. Mayor of Franklin*, 1 Humph. 156, 34 Am. Dec. 625, note; *Bethune v. Hughes*, 28 Ga. 560, 73 Am. Dec. 789, and note on page 793.

⁵⁷ *Cincinnati v. Buckingham*, 10 Ohio, 257.

⁵⁸ *Ex parte Canto*, 21 Tex. App. 61, 57 Am. Rep. 609; *Newson v. Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; *Henry v. Mayor of Macon*, 91 Ga. 268, 18 S. E. 143. In this case the court decided that the

legislature could not constitutionally confer power upon a city to forbid all sales of marketable commodities outside of the market-place without regard to time.

⁵⁹ *State v. St. Paul*, 32 Minn. 329. The authorities upon this point are conflicting. See note to *Robinson v. Franklin*, 34 Am. Dec. 638, 1 Humph. 156.

⁶⁰ *Caldwell v. City of Alton*, 33 Ill. 416.

⁶¹ *Wartman v. Philadelphia*, 33 Pa. St. 202; *State v. Mayor*, 5 Port. (Ala.) 279; *St. John v. Mayor*, 8 Bosw. (N. Y.) 483.

⁶² *Henkel v. City of Detroit*, 49 Mich. 249, 43 Am. Rep. 464.

ing from selling their produce at first hand to consumers in the principal city market, and compels them to be sold by holders of stalls at second hand, is void.⁶³

§ 54. Prevention of fires.—A municipal corporation may, in the exercise of its power to protect the lives and property of its citizens, take all reasonable measures to prevent the rise and spread of conflagrations. It may prescribe fire limits and prohibit the construction of wooden buildings within such limits. When it has enacted such a prohibition, it may, without judicial proceedings, destroy a building erected in violation thereof. The power to enact ordinances of this class for the prevention of fires has been held to be included in the general police power of a municipality;⁶⁴ but it is usually conferred in express terms.⁶⁵ The municipality may legally forbid the erection of a wooden building within the fire limits, although the contract for its construction was made before the ordinance determining the limits was enacted.⁶⁶ Under the pressure of a controlling public necessity, even “where the owners themselves have fully observed all their duties to their fellows and to the state,” private property may be taken and destroyed when necessary to prevent the spread of fire, “the ravages of pestilence, the advance of a hostile army, or any other great public calamity.”⁶⁷

⁶³ “A city has no right, and the city has never been empowered, to shut out the producers of fresh provisions and similar farm and garden articles from having convenient access to customers.” *Hughes v. Recorder’s Court of Detroit*, 75 Mich. 574, 4 L. R. A. 863.

⁶⁴ See *Baumgartner v. Hasty*, 100 Ind. 575.

⁶⁵ *Eichenlaub v. St. Joseph*, 113 Mo. 395, 18 L. R. A. 590; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Klingler v. Bickel*, 117 Pa. St. 326; *Ford v. Thralkill*, 84 Ga. 169, 10 S. E. 600. Some courts hold that the power must be expressly conferred. See *Des Moines v. Gilchrist*, 67 Iowa 210; *Kneedler v. Morristown*, 100 Pa.

St. 368; *Pye v. Peterson*, 45 Tex. 312.

⁶⁶ *Knoxville v. Bird*, 12 Lea (Tenn.), 121.

⁶⁷ *Cooley*, Const. Lim. (7th ed.) 878; *Saltpetre Case*, 12 Coke, 12; *Meeker v. Van Renselaer*, 15 Wend. 397; *McDonald v. Red Wing*, 13 Minn. 38, Gil. 25; *Jones v. Richmond*, 18 Gratt, 517. This case was disapproved in *Wallace v. Richmond*, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554. It held that it was proper for the municipal authorities of Richmond, anticipating the capture of the city, to take possession of and destroy all liquor in the city. If damaged grain stored within the limits of a city be found detrimental to the public health it may be destroyed. *Dunbar v. Augusta*, 90 Ga. 390.

A municipal corporation which has a general authority to pass police ordinances, or to make orders and regulations for public safety, may maintain fire engines, and a fire department.⁶⁸

§ 55. Care of the indigent and infirm.—The care of the indigent and the infirm in body, mind and morals is a duty which may properly be imposed upon a public corporation. The insane, the criminal and the pauper constitute a charge upon the community, and the expenses of their care may be met by taxation. Schools, almshouses and hospitals, when under the control of the public and open to all of a given class who need aid, are public institutions. But the power of taxation cannot be employed to support such institutions when they are under the control of private persons who are not accountable to the government.⁶⁹ These general principles have been recently discussed in connection with cases growing out of the movement for the care and treatment of habitual drunkards. The decisions have not been uniform, but the rule will probably be established that the public money may legally be used for this purpose. It was held in Maryland that an act authorizing the sending of any habitual drunkard for treatment to any institution within the state at the expense of the county or city, if neither the patient nor the petitioning kinsmen are financially able to pay the expenses, is valid.⁷⁰ The court said: "There can be no doubt as to the power of the legislature to require the payment by the city of a sum requisite to defray the expense of maintenance and medical treatment of an habitual drunkard residing within the corporate limits." The decision seems to regard the act as a proper exercise of the police power. The same principle appears to be recognized in Colorado, although the decision turned upon questions of construction. It was there held that the treatment of inebriates by a private corporation at the expense of a county is not the performance of a municipal function, and that such an appropriation of the county funds is not an appropriation of

⁶⁸ Baumgartner v. Hasty, 100 Ind. 675; Bluffton v. Studebaker, 106 Ind. 129; Allen v. Taunton, 19 Pick. 485; Green v. Cape May, 41 N. J. L. 45.

⁶⁹ Hare, Am. Const. Law, I. p. 284.
⁷⁰ Baltimore v. Keeley Inst. of Maryland, 81 Md. 106, 27 L. R. A. 646.

state moneys within the meaning of the constitution.⁷¹ In Wisconsin a statute providing for the commitment of habitual drunkards who have not the means to pay for treatment to some institution within the state to be designated in the order, "provided that the expense of treatment in each case shall not exceed the sum of one hundred and thirty dollars, which sum shall cover and include all expenses for treatment, medicines and board for four weeks, and such expense shall be paid by the county," was held not within the police power of the state and hence unconstitutional, because requiring the county to expend the proceeds of taxation for a private purpose. The beneficiaries were not "poor" in the technical sense of the word,—destitute, in extreme want or helplessness. They were not the subjects of public charity, nor afflicted with a contagious or infectious disease. "The question recurs," says Chief Justice Cassoday, "whether any county may be compelled to pay any private party for treatment, medicines and board of any resident therein, having a disease not contagious or infectious, merely because such diseased person 'has not the means to pay for such treatment.' If a county may be compelled to make such payment for such treatment, medicine and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines and board of any person having any disease, though not contagious or infectious, provided the victim has not the present means of making such payment himself. We are clearly of the opinion that no such power exists."⁷²

⁷¹ Re House, 23 Colo. 87, 33 L. R. A. 832. The case of *Senate of Happy Home Clubs v. Alpena County*, 99 Mich. 117, 23 L. R. A. 144, declares the Michigan "Jag Law" unconstitutional. In *Foreman v. Hennepin Co.*, 64 Minn. 371, 67 N. W. 207 (1896), the act was held invalid because attempting to make an improper delegation of authority. But it may reasonably

be inferred that the act would have been sustained on general principles.

⁷² *Wisconsin Keeley Inst. Co. v. Milwaukee County*, 95 Wis. 153, 36 L. R. A. 55. See a criticism of this case in 31 Am. Law Rev. 616. Compare *Baltimore v. Keeley Institute of Maryland*, 81 Md. 106, 27 L. R. A. 647, where a similar act was held valid.

CHAPTER VI.

JUDICIAL POWER.

§ 56. Power to establish courts.
56a. Jurisdiction.

§ 57. Qualifications of judges and jurors.

58. Procedure—Jury trial.

§ 56. Power to establish courts.—By the common law, municipal corporations have power to establish courts for the purpose of determining controversies of limited and local importance. The early charters “contained grants of courts of various degrees and importance; the mayor and aldermen were in some instances made magistrates *ex officio* and authorized to hold courts of quarter sessions, and these grants were accompanied or not, as the case might be, by a clause called the ‘*non-intromittant*’ clause, which ousted the jurisdiction of the county magistrates. In some cases towns were made counties by themselves; in some cases there was no limitation at all upon the extent of the town jurisdiction; they might try all crimes and inflict any punishment up to death; in other cases they were confined within narrower limits.”¹

The grant of power to hold a court imposes a duty upon the municipality.² In the United States these courts are known by various names, such as municipal, mayor’s, recorder’s and police courts. Their creation and jurisdiction rest with the legislature, which may modify and change their jurisdiction at will.³ The legislature must, of course, act in accordance with constitutional provisions. When the constitution confers upon the legislature authority to create “other courts” than those named in the constitution, it may erect municipal courts for the trial of offenses against municipal ordinances and confer upon them the general powers of justices of the peace within the limits of the municipality.⁴

¹ Stephens, Hist. Crim. Law of Eng., I, p. 116.

² Rex v. Mayor of Hastings, 5 Barn. & Ald. 692.

³ Boyd v. Chambers, 78 Ky. 140.

⁴ State v. Young, 30 Kan. 445;

Shafer v. Muma, 17 Md. 331. See Fawcett v. Pritchard, 14 Wash. 604.

A municipal court cannot sit outside of the corporation limits. Herschoff v. Beverly, 43 N. J. L. 139.

§ 56a. Jurisdiction.—The jurisdiction of municipal courts ordinarily extends to the enforcement of municipal ordinances and the recovery of penalties for a breach thereof and to controversies between individuals when the amount involved does not exceed a specified amount.⁵ They are often empowered to determine civil suits where the amount involved does not exceed five hundred dollars, and when title to land is not involved. As a rule they have no equity jurisdiction. In some instances, however, the jurisdiction of city courts is by statute made as extensive as that of the district and circuit courts.⁶ When the jurisdiction is not co-extensive with the limits of a municipality, the court is not properly a municipal court. But the fact that it is called by that name is not material when the constitution authorizes the creation of inferior courts, and the court created comes within this designation.⁷

§ 57. Qualifications of judges and jurors.—The common-law rule that the municipality cannot be a suitor in its own court and that a member of the corporation cannot sit as judge or juror in a suit in which the corporation is interested⁸ is not enforced in the United States. It is considered that the interest which each citizen has in the result of such litigation is too inconsiderable to give rise to any prejudice.⁹

⁵ *Fox v. Ellison*, 43 Minn. 41; *Henderson v. Davis*, 106 N. C. 88; *People v. Lawrence*, 82 Cal. 182; *State v. Wright*, 80 Wis. 648; *Brown v. Jerome*, 102 Ill. 371.

⁶ *Bledsoe v. Gary*, 95 Ala. 70, 10 So. 502. As to jurisdiction in cases of violation of game laws, see *State v. Synott*, 89 Me. 41; *bastardy*, *Williams v. State*, 112 Ala. 688; *forcible entry and unlawful detainer*, *Suchanek v. State*, 45 Minn. 26.

⁷ *Shaffel v. State*, 97 Wis. 377, 72 N. W. 888.

⁸ *City of London v. Wood*, 12 Mod. 674; *Reg. v. Rogers*, 2 Lord Raym. 777.

⁹ *City Council v. Pepper*, 1 Rich. (S. C.) 364; *State v. Wells*, 46 Iowa, 662; *Montezuma v. Minor*, 73 Ga. 484. But see *Omaha v. Olmstead*, 5 Neb. 446; *Kemper v. Louisville*, 14 Bush, 87. It is held that in an action in a state court to which a municipal corporation is a party, a taxpayer of the corporation cannot serve as a juror unless his common-law liability has been expressly or impliedly removed by statute. *Dively v. Elmira*, 51 N. Y. 506; *Boston v. Baldwin*, 139 Mass. 315; *Kindinger v. Saginaw*, 59 Mich. 355. See *Beach, Pub. Corp.*, sec. 1289.

§ 58. Procedure—Jury trial.—The procedure in municipal courts is ordinarily of a summary nature, as the number and comparative unimportance of the offenses tried renders the system of jury trial impracticable. The constitutional right to a jury trial has never been understood to apply to violations of city ordinances. The violations of such ordinances are not criminal offenses or crimes as those words are understood in constitutional law. The constitutional guaranty that “the right of trial by jury shall remain inviolate” does not prevent the enforcement of municipal ordinances by a summary procedure;¹⁰ but the legislature cannot confer upon municipal corporations the power to proceed summarily and try persons for the commission of criminal offenses against the laws of the state.¹¹ It is generally held in the state courts that the constitutional right of a jury trial is not denied if the defendant, who is convicted summarily in an inferior court, has a right to appeal to a higher court where he can obtain a jury trial;¹² but the supreme court of the United States, in a recent case,¹³ said: “We cannot assent to that interpretation of the constitution, except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose. The guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged.”

Actions for violations of city ordinances are sometimes brought in the name of the state¹⁴ and sometimes in the name of the corporation.¹⁵

¹⁰ *Callan v. Wilson*, 127 U. S. 540; *State v. Lee*, 29 Minn. 445; *State v. Robitshek*, 60 Minn. 123; *State v. Harris*, 50 Minn. 128; *Hollenbeck v. Marshalltown*, 62 Iowa, 21; *State v. Glenn*, 54 Md. 571.

¹¹ *Tierney v. Dodge*, 9 Minn. 156. For the history of courts of summary jurisdiction, see *Stephens' Hist. Crim. Law*, I, p. 122.

¹² *Jones v. Robins*, 8 Gray, 329; *Maxwell v. Board*, 119 Ind. 20; *Emporia v. Volmer*, 12 Kan. 622.

¹³ *Callan v. Wilson*, 127 U. S. 540, 556.

¹⁴ *State v. Powell*, 97 N. C. 417. Although the prosecution is in the name of the state the offenses are against the city, and a notice of appeal must be served on the city attorney and not on the attorney-general. *State v. Sexton*, 42 Minn. 154. The state as such has no interest in a prosecution for a violation of a city ordinance. *State v. Robitshek*, 60 Minn. 123.

¹⁵ *Williams v. Com.*, 4 B. Mon. (Ky.) 146; *Davenport v. Bird*, 34 Iowa, 524; *Ex parte Holwedell*, 74 Mo. 395.

CHAPTER VII.

STREETS AND HIGHWAYS.

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| <p>§ 59. Nature of a public way.
60. How established.
61. Relation of public corporation to streets and highways.
62. Rights remaining in the fee-owner.
63. Rights of abutters as such.
64. Uses not within the public easement.</p> | <p>§ 65. Power of municipal corporations to grant franchises.
66. Police ordinances regulating use of streets, and franchise companies.
67. Vacation: power of municipal authorities.
68. Vacation: rights of abutters.</p> |
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§ 59. Nature of a public way.—A street or highway, it is to be remembered, is the space devoted to the purposes of a public way; and the easement of a public way is vested in the unorganized public. The power over this public easement which may be exerted by the legislature, as representing the public, may be delegated by it to municipalities.

§ 60. How established.—The easement of a way may be acquired by the public in any one of several modes:

(1) By rights in the nature of prescription: As the presumption which supports a prescriptive right is that of a lost grant, under a strict view it cannot apply as to a public way because the unorganized public is not such a grantee as can take by grant.¹ There may be by analogy, however, after user for twenty years, a conclusive presumption that originally the way was legally laid

¹ Angell, Highways (3rd ed.), N. Y. 397, 31 N. E. 887; but statute § 131; compare Elliott, Roads and Streets, (2nd ed.) § 169; Post v. Pearsall, 22 Wend. 444; compare Speir v. New Utrecht, 121 Cohoes v. Delaware, etc., Co., 134 N. Y. 420, 24 N. E. 692.

out by the proper local authorities. Such a presumption obtains in most states.² Ways resting upon it are usually termed "ways by prescription," and are proved by substantially the same evidence as would support technical prescription.³

(2) By dedication: A dedication of land to the use of a public way is effected by acts of the owner expressly or impliedly devoting it to such use, and an acceptance by or on behalf of the public, which acceptance raises an estoppel against the owner.⁴ According to the original doctrine, the acceptance to complete the dedication might be either by a simple public user or by acts of public authorities dealing with the land as a highway.⁵ But the courts of many states, because of the responsibility imposed on municipal corporations for defects in ways and the need of intelligent representation on behalf of the public, have adopted the rule that the acceptance must be either expressly or impliedly by acts of public authorities in charge of the public ways of the locality.⁶ As a rule the offer to dedicate may be withdrawn be-

² *Odlorne v. Wade*, 5 Pick. 421; *Reed v. Northfield*, 13 Pick 94; *Commonwealth v. Coupe*, 128 Mass. 63; *Rose v. Farmington*, 196 Ill. 226; 63 N. E. 631; *Comm. v. Cole*, 26 Pa. 187; *Blanchard v. Moulton*, 63 Me. 434; *Cohoes v. Delaware, etc., Co.*, 134 N. Y. 397, 31 N. E. 887; *Detroit v. Rd. Co.*, 23 Mich. 173. As to the distinction in the case of unenclosed woodland, see *Hutts v. Tindall*, 6 Rich. Law, 396.

In *Krier's Private Road*, 73 Pa. 109, it was held that roads by prescription rest on adverse user, in analogy to the statute of limitations, and not upon the fiction of a lost grant. And see *Marion v. Skillman*, 127 Ind. 130.

³ To establish a way by prescription, the use must have been adverse, exclusive, continuous, and uninterrupted for a period of twenty years, and with the knowledge of the owner of the land. *Rose v. Farmington*, 196 Ill. 226, 63 N. E. 631. See *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *State v. Green*, 41 Ia. 693; *Pentland v. Keep*,

41 Wis. 490; *Howard v. State*, 47 Ark. 431.

⁴ *Cincinnati v. White*, 6 Pet. 431; *Hobbs v. Lowell*, 19 Pick. 405; *Cohoes v. Delaware, etc., Co.*, 134 N. Y. 397, 31 N. E. 887 and cases cited; *Bushnell v. Scott*, 21 Wis. 451, 94 Am. Dec. 555; *Curtiss v. Hoyt*, 19 Conn. 154.

As a dedication rests on estoppel, it cuts off any adverse right of dower in the land. *Venable v. Wabash Western R. Co.*, 112 Mo. 103, 20 S. W. 493.

⁵ *Manderschid v. Dubuque*, 29 Ia. 73; *Cincinnati v. White*, 6 Peters, 431.

⁶ *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332; *State v. Wilson*, 42 Me. 9; *Tillman v. People*, 12 Mich. 401; *Chapman v. Saulte Ste. Marie*, 146 Mich. 23; *Harriman v. Howe*, 78 Hun. 280, *affd.* 155 N. Y. 683; *Russell v. Chicago, etc., R. Co.*, 205 Ill. 155. *Contra*, *Manderschid v. Dubuque*, 29 Ia. 73. In Massachusetts dedication of ways has been abolished by statute. *Comm. v. Coupe*, 128 Mass. 63.

fore acceptance; but after a street has been opened by a landowner and abutting lots sold, the purchasers ordinarily acquire a right in the nature of an equitable easement to have the street remain open, which prevents subsequent withdrawal.⁷

In some states a method for making dedication of streets is provided by statute. It usually consists of making, acknowledging, and recording a plat or plan; and it usually vests the fee in the local corporation. An ineffectual endeavor to make a statutory dedication may take effect as a common law dedication, if the elements of a common law dedication are present.⁸

A municipal corporation may acquire land in fee by voluntary purchase and open a public way upon it, or it may acquire an easement only, and appropriate the easement to the public. In such cases, the foundation of the public way is still dedication, but dedication by the corporation.⁹

(3) By exercise of the right of eminent domain in proceedings authorized by statute: Except where the statute expressly and clearly provides that the proceedings shall vest the fee in the corporation, only the easement of a public way is taken.¹⁰

§ 61. Relation of public corporation to streets and highways.—As the substance of a public way, however established, is the easement which resides in the public at large, the local corporation within the boundaries of which it is situated ordinarily has no legal title in it. It may under some circumstances have title to the fee in the land, but even then it holds it subject to the public rights. Its position is merely that of a governmental agency having possession and control.¹¹ In most states the corporation is expressly charged with the duty of repairing the public ways within its territory as a mandatory duty. In others it is judicially deemed to be charged with such a duty under its general authority to care for and control them.

A municipal corporation is usually invested, under grants in general terms, with discretionary authority to establish, alter,

⁷ *Riverside v. MacLain*, 210 Ill. 308.

⁸ *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088; *People v. Marin Co.*, 103 Cal. 223, 26 L. R. A. 659; *Hurley v. Mississippi, etc., Co.*, 34 Minn. 143, 24 N. W. 917.

⁹ *San Francisco v. Calderwood*, 31 Cal. 585; *Tillman v. People*, 12 Mich. 401.

¹⁰ *Stackpole v. Healy*, 16 Mass. 33, and c. c.

¹¹ *Clinton v. Railroad Co.*, 24 Ia. 455.

improve and vacate streets and highways, and to enact police regulations to promote the safety, convenience and comfort of the public in using them.

It has no power, even though it owns the fee, to pervert the way to other uses, or to assign any portion of it to a special private use. A city cannot, for example, authorize an abutter to maintain a stairway within the street line to connect with an upper story.¹² But this rule has no bearing upon the power to grant franchises to private corporations where the purpose is a public service.

A local corporation has no such property interest in a way as to entitle it to damages for the flooding thereof under the mill acts, even though it is required to make the necessary repairs.¹³ But a liability that rests upon it for defects in public ways, and a responsibility for their maintenance, gives it an interest which entitles it to a remedy in equity by injunction against any unauthorized obstruction or encroachment.¹⁴ And it may recover over from one who has caused a defect, the amount of the expenses of repairing¹⁵ or of a judgment recovered against it for damages occasioned thereby.¹⁶

Where the fee of a public highway is in the municipality, there is no technical impediment to its maintaining ejectment against one who is perverting or obstructing it. Where it has not the fee, a technical difficulty presents itself against such an action, but the courts have been impelled by considerations of expediency to the conclusion that the statutory right to possession is suffi-

¹² *McCormick v. Weaver*, 144 Mich. 6, 107 N. W. 314. And see *Lowery v. Pekin*, 210 Ill. 575, 71 N. E. 626; *Mikesell v. Durkee*, 34 Kas. 509. A city cannot grant a right to maintain a private railway track in a street. *Heath v. Des Moines, etc., R. Co.*, 61 Ia. 11, 15 N. W. 573; *Hatfield v. Straus*, 189 N. Y. 208. See 1 *Andrews, American Law*, § 408.

¹³ *Cheshire v. Reservoir Co.*, 119 Mass. 356; A highway is not a "public work owned by a city" within

the meaning of a statute. *McHugh v. Boston*, 173 Mass. 408, 53 N. E. 905.

¹⁴ *Newark v. Del. Lack., etc., R. Co.*, 42 N. J. Eq. 196, 7 Atl. 123; *Detroit v. Detroit, etc., R. Co.*, 23 Mich. 173; *Springfield v. Conn. River R. Co.*, 4 Cush. 63; 2 *Dillon, Municipal Corporations*, (4th ed.) § 659, and cases cited.

¹⁵ *Andover v. Sutton*, 12 Met. 182.

¹⁶ *Lowell v. Spaulding*, 4 Cush. 277.

cient to enable it to maintain ejectment, even against the owner of the fee.¹⁷

§ 62. Rights remaining in the fee-owner.—The owner of the fee in a highway, who is usually the owner of the abutting property, retains all the rights of ownership in the soil not inconsistent with the public easement.¹⁸ He may make a reasonable use of any part of the space which may be unused and unneeded by the public, or which does not interfere with the public use,¹⁹ and may excavate beneath the surface; as, for example, for an addition to a cellar.²⁰

The owner of the fee is entitled to the timber and vegetation on the land, and the springs and minerals therein. He may maintain trespass against any person who without right plows the soil, cuts trees or picks fruit beside the roadway;²¹ and he may maintain ejectment or procure an injunction against one who, without right, places a permanent structure or obstruction thereon.²² If the city or its officers, or contractors under its authority, quarry rock or dig gravel in the land, except properly for purposes of grading or repairing, they are liable to him in damages.²³

¹⁷ Cincinnati v. White, 6 Peters, 431; Hoboken Land, etc., Co. v. Hoboken, 36 N. J. L. 540; City of California v. Howard, 78 Mo. 88; 2 Dillon, Mun. Corp. (4th ed.) § 662.

¹⁸ "The owner of the land therefore retains his title in trees, grass, growing crops, buildings and fences standing in the highway at the time of the laying out, (unless he fails to remove them within a reasonable time after notice to do so,) as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made." Gray, C. J., in Denniston v. Clark, 125 Mass. 216, at 221.

¹⁹ (Keeping piles of wood) King v. Norcross, 196 Mass. 373; (ditch for drainage) Nelson v. Fehd, 203 Ill. 120, 67 N. E. 828. In this case it was held that the question was

properly left to a jury whether a ditch rendered the highway unsafe, and upon their verdict that it did so, the fee-owner was held liable to a traveller for personal injuries occasioned thereby.

²⁰ McCarthy v. Syracuse, 46 N. Y. 194; Allen v. Boston, 159 Mass. 324, 34 N. E. 519.

²¹ Turner v. Board, L. R. 9 Eq. 418; Daily v. State, 51 Oh. St. 348, 37 N. E. 710.

²² Peck v. Smith, 1 Conn. 103; Goodtitle v. Alker, 1 Burr. 133; Colstrum v. Railway Co., 33 Minn. 516, 24 N. W. 255; Postal Tel. Co. v. Eaton, 170 Ill. 513, 49 N. E. 365.

²³ Adams v. Emerson, 6 Pick. 57; Rich v. Minneapolis, 37 Minn. 423, 35 N. W. 2; Robbins v. Barnum, 1 Pick. 122; Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428.

When a city council or such other public authority as has been given power to do so discontinues or abandons the way, the land reverts to the fee-owner freed of the servitude.²⁴ This was held to be the consequence even in a case where the corporation had paid the owner full damages for the establishment of the way and had discontinued the way before actually constructing and opening it.²⁵

The rights of the fee-owner are inferior to the needs of public accommodation, and must give way to the requirements of the public authorities in grading, repairing or improving the highway, and in passing regulations for public safety and convenience.²⁶ In working, grading and repairing the way, the public authorities are entitled also to take and utilize the materials contained in the land. They may take soil, gravel, rock or timber from one part of the way and use it at another; and by some authorities may take the same from one street or highway and use it in another street or highway within the same administrative jurisdiction, on the ground that the whole system of each local jurisdiction is but one indivisible easement.²⁷

It is a violation of the rights of the fee-owner to devote the soil, without his consent, to any use which is not within the scope of the easement of a public way. If a public corporation or any private person or corporation, even acting under express legislative permission, imposes a new servitude upon the fee (otherwise than under the right of eminent domain, making due compensation) the fee-owner may maintain trespass or ejectment or have an injunction. The action violates his property rights in the land, and the authorizing statute is unconstitutional.²⁸

²⁴ *Jackson v. Hathaway*, 15 Johns. 447.

²⁵ *Westbrook v. North*, 2 Greenlf. (Me.) 179; *Furbish v. Co. Commrs.*, 93 Me. 117, 44 Atl. 364.

²⁶ "Yet in any highway the municipal authorities may do all acts appropriate or incidental to its use by the public. They may raise or lower the surface, dig up the earth, cut down trees, or do any other thing necessary or proper to keep the highway in suitable repair and

condition." *Boston v. Richardson*, 13 Allen 146, at 159. Trees planted by a fee-owner in the highway are subject to removal by public authorities in improving the way. *Sherman v. Butcher*, 72 N. J. L. 53.

²⁷ *Denniston v. Clark*, 125 Mass. 216, and cases cited; *Huston v. Fort Atkinson*, 56 Wis. 350, 14 N. W. 444; *Griswold v. Bay City*, 35 Mich. 452. Compare *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. 428.

²⁸ Cases cited, *infra*, § 64.

When the fee is owned by a municipal corporation, there are probably few circumstances, if any, under which the right of the corporation as fee-owner could be asserted in resistance to official action authorized by the legislature; for the corporation holds the fee merely as a custodian for the public, and subject to legislative disposal.²⁹

§ 63. Rights of abutters as such.—In the absence of controlling evidence, the owner of property which abuts on a street or highway is presumed to own to the middle of the way.³⁰ But regardless of the ownership of the fee—whether the fee be in the abutter, in other persons, or in the municipality—he is invested with an easement in the space in front of his property for access, light and air. This easement is implied in law from the position of the property; it entitles the abutter to have the street or highway remain unobstructed in front of his premises, and consequently protects him as against most new uses which, if he owned the fee, would be new servitudes upon his land.³¹ By the general view, it does not prevail as against uses to which a public way may properly be put, even though such uses injure the abutter in his access, light or air. For example: in the absence of statutory provision, an abutter is not entitled to damages for the lowering of the grade of a highway, though the change may interfere with access to his property.³²

²⁹ *Clinton v. Railroad Co.*, 24 Ia. 455.

³⁰ *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, and cases cited. See *Boston v. Richardson*, 13 Allen, 146.

³¹ (Elevated railroad, fee in city) *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, 10 N. E. 528; (steam railroad) *Onset Ry. Co. v. Co. Commrs.*, 154 Mass. 395, 28 N. E. 286; *Theobald v. Louisville, etc., Railway Co.*, 66 Miss. 279; see *Grand Rapids, etc., R. Co. v. Helsel*, 38 Mich. 62; and see next section for cases *contra* as to steam-railroad.

³² *Callender v. Marsh*, 1 Pick. 418; (viaduct) *Selden v. Jacksonville*, 28 Fla. 558, 14 L. R. A. 370

(annotated); (viaduct) *Sauer v. New York*, 206 U. S. 536; *Henderson v. Minneapolis*, 32 Minn. 319; *Radcliff v. Brooklyn*, 4 N. Y. 205, 53 Am. Dec. 357; *Fellowes v. New Haven*, 44 Conn. 240, 26 Am. R. 447; *Hovey v. Mayo*, 43 Me. 322; *Burlington v. Gilbert*, 31 Ia. 356, 7 Am. R. 143; *Delphi v. Evans*, 36 Ind. 90; *Schattner v. Kansas City*, 53 Mo. 162. *Contra* (where the land-owner has improved his property with reference to an established grade). *Crawford v. Delaware*, 7 Oh. St. 459; *Akron v. Chamberlain Co.*, 34 Oh. St. 328. So if a subway cuts off cellar-extensions under the street, the abutter is not entitled to damages. *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327.

§ 64. Uses not within the public easement; nuisances and new servitudes.—An appropriation of any portion of a street or highway to a use which is not properly within the easement of a public way is usually, in so far as it impedes the free use of the space by the public, a public nuisance. Such a nuisance is beyond any general power of a public corporation to establish or to authorize. Thus, a city has no power to construct a market-house,³³ or a stand-pipe,³⁴ or an electric light plant³⁵ in a street or square; nor to grant a license to a fruit-dealer to keep a permanent booth upon a sidewalk.³⁶ As regards the public rights, however,—the aspect of the obstruction as a nuisance to the public—it may be legalized by statute, or by a municipal ordinance passed under special and express authority; for the rights of the public may be relinquished by legislation.³⁷ But such uses invade also the rights of the fee-owner and abutter. As respects him they cannot be made legal, without his consent, except under the right of eminent domain; for they impose a new servitude upon the fee, and they violate the abutter's easement. As against a fee-owner or an abutter, not even statutory authority can make rightful the erection by a city in a public street of the above structures.³⁸

In deciding what uses are included in the original easement of a public way, courts have adopted the policy of allowing liberally for the needs of the public. The easement embraces new and improved modes of travel and transportation as they may be invented from time to time.³⁹ It even includes use of the space

³³ State v. Mayor, 5 Porter (Ala.) 279; State v. Laverack, 34 N. J. L. 201; Columbus v. Jacques, 30 Ga. 506; (town hall) Princeville v. Auten, 77 Ill. 325.

³⁴ Barrows v. Sycamore, 150 Ill. 588.

³⁵ McIlhinny v. Trenton, 148 Mich. 380.

³⁶ Costello v. State, 108 Ala. 45.

³⁷ Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75.

³⁸ Cases cited *supra*. A grain elevator placed upon a public wharf is not a new servitude, because the use is not a different one from that to which the property was dedi-

cated. Ill., etc., Canal Co. v. St. Louis, 2 Dillon (U. S. Ct.) 70.

³⁹ "The location of a highway creates a servitude which includes all forms of travel not prohibited by law, with the right in the Legislature to give to municipal or other corporations, or to private individuals, the power reasonably to modify the use of the same for travel, as public convenience and necessity, in the application of modern improvements, may from time to time require." Attorney-General v. Metropolitan Railroad Co., 125 Mass. 515, at 518.

below the surface; a subway is not a new servitude.⁴⁰ An ordinary street-railroad is not a new use, whether drawn by horses,⁴¹ or propelled with electricity from trolleys,⁴² or with steam motors;⁴³ for it does not exclude other travel from the portion of the way occupied by the tracks, and is conducted in co-operation with other vehicles and travelers. It has been held that even interurban street-railways, carrying mail, baggage and express matter, are within this class.⁴⁴ But a steam commercial railroad of the ordinary type is a new use. The graded road-bed, the high rails, and the velocity of the trains, exclude other travel from the appropriated space; and these and other attributes make the use a different and inconsistent one.⁴⁵ The same has been decided of elevated railroads.⁴⁶

Many courts have decided that when a municipality owns the fee in a highway, no rights of an adjoining owner are violated by the mere placing of a steam-railroad or similar foreign burden

⁴⁰ *Sears v. Crocker*, 184 Mass. 586; *Adams v. Saratoga & Washington Rd. Co.*, 11 Barb. 414; (where fee is in the government) *Chicago v. Rumsey*, 87 Ill. 348; *Summerfield v. Chicago*, 197 Ill. 270.

⁴¹ *Hinchman v. Paterson Horse Railroad Co.*, 17 N. J. Eq. 75; *Attorney-General v. Metropolitan Rd. Co.*, 125 Mass. 515; *Finch v. Riverside, etc., Ry. Co.*, 87 Cal. 597; *People v. Kerr*, 27 N. Y. 188.

⁴² *Howe v. West End St. Ry.*, 167 Mass. 46; *Detroit City Ry. v. Mills*, 85 Mich. 634. (Trolley poles) *Halsey v. Rapid Tr. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. 859.

⁴³ *Briggs v. Lewiston, etc., Horse R. Co.*, 79 Me. 363; *Newell v. Ry. Co.*, 35 Minn. 112.

⁴⁴ *Mordurst v. Ft. Wayne, etc., Traction Co.*, 163 Ind. 268. But *contra*, *Chicago, etc., R. Co. v. Milwaukee, etc., R. Co.*, 95 Wis. 561, 70 N. W. 678, 60 Am. St. R. 136, 37 L. R. A. 856.

⁴⁵ *Phipps v. W. Maryland R. Co.*, 66 Md. 319; *Nichols v. Ann Arbor & Y. St. Ry. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Grand Rapids, etc., R. Co. v. Helsel*, 38 Mich. 62; *Street Ry. Co. v. Doyle*, 88 Tenn. 747; *Springfield v. Connecticut River R. Co.*, 4 Cush. 63; *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Athens Terminal Co. v. Athens F. & M. Works*, 129 Ga. 393, 58 S. E. 801; *O'Connell v. Chicago, etc. R. Co.*, 184 Ill. 308, 56 N. E. 353; *Burlington v. Penn. R. Co.*, 56 N. J. Eq. 259, 38 Atl. 849. *Contra*, *Montgomery v. Santa Ana & W. R. Co.*, 104 Cal. 186, 37 Pac. 786, 43 Am. St. R. 89, 25 L. R. A. 654; *Porter v. No. Mo. R. Co.*, 33 Mo. 128; *Struthers v. Dunkirk, etc., Ry. Co.*, 87 Pa. St. 282.

⁴⁶ *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, 10 N. E. 528; *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

in a street.⁴⁷ But the strong tendency of authority is toward recognizing the abutter's easement as prevailing in such cases, and entitling him to compensation as in the case of a new servitude; which seems the sounder view.⁴⁸ Even where such view does not obtain, the abutter is often held entitled to damages for any special, consequential injury to his estate.⁴⁹

By some authorities, the public easement is not limited to modes of travel, but entitles the public to use the highway as a general channel of communication and transmission; that is, for sewers and water-pipes for furnishing facilities to abutting estates; gas-pipes and electric-light poles and wires for the same purpose, or for lighting streets; telegraph and telephone poles and wires and the like.⁵⁰ On the other hand, although it is unanimously conceded on one ground or another that sewer, water and gas-pipes are legitimate, many courts have firmly adhered to the rule that telegraph and telephone systems, as they are not forms

⁴⁷ Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516 (changed by Ill. Constitution); O'Connor v. St. Louis, etc., R. Co., 56 Ia. 735; Iron Mt. R. Co., v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

⁴⁸ *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, 10 N. E. 528; *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122, 43 Am. R. 146; *Decker v. Evansville Suburban R. Co.*, 133 Ind. 493, 33 N. E. 349; *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051; *Montgomery v. Santa Ana & W. R. Co.*, 104 Cal. 186, 37 Pac. 786; *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich. 62, 31 Am. R. 306; *Onset Ry. v. Co. Commrs.*, 154 Mass. 395, 28 N. E. 286.

"The later and better considered judgments hold that it is comparatively unimportant as respects the relative rights of the abutting owner and the public in and over streets [in cases of obstructions?] whether the bare fee is in the one or the other. If the fee is in the public the lawful rights of the adjoining

owners are in their nature equitable easements; if the fee is in the abutter his rights in and over the street are in their nature legal; but, in the absence of controlling legislative provision, the extent of such rights is, in either event, substantially, perhaps precisely, the same." 2 Dillon, *Municipal Corporations*, (4th ed.) § 664a.

⁴⁹ *So. Carolina R. Co., v. Steiner*, 44 Ga. 546.

⁵⁰ "Whenever land is taken for public use as a highway, and due compensation made, the public, or those corporations or officers who act as trustees or agents of the public, have a right to make any use of the land, directly or incidentally conducive to the enjoyment of the public easement, and which the necessity or convenience of the public may require; the landowner receives a sum in damages which in theory of law is an indemnity for all such uses, unless special provision for further compensation is made by statute; and such uses clearly include the making of cul-

of travel and are not incident to the use or the care of the streets or to the enjoyment of abutting estates, are not within the public easement.⁵¹

§ 65. Power of municipal corporations to grant franchises in streets.—The right to enjoy a special franchise in a public way, even though it involves using the way in a manner which is within the public easement, can arise only from legislative grant.

verts, drains and sewers under the highway for the cleansing of the streets and the accommodation of the inhabitants on either side. *Brainard v. Clapp*, 10 Cush, 8-10, and cases cited. *Codman v. Evans*, 5 Allen, 309; *Cone v. Hartford*, 28 Conn. 363; *West v. Bancroft*, 32 Verm. 367; *People v. Kerr*, 27 N. Y. 203, 204. The right of digging in the highways for the purpose of laying and repairing common sewers and drains was expressly affirmed and regulated, without providing for compensation to any one, in the earliest statute of Massachusetts upon the subject. *Prov. St. 8 Anne, c. 3*; *Mass. Prov. Laws*, (ed. 1726), 203; *Anc. Chart. 389*." *Boston v. Richardson*, 13 Allen 48, at 159; *Cone v. Hartford*, 28 Conn. 363; *Kelsey v. King*, 32 Barb. 410; (telegraph) *Pierce v. Drew*, 136 Mass. 75; (telegraph) *People v. Eaton*, 100 Mich. 208, 59 N. W. 145.

⁵¹ *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 202; *Postal Tel. Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365; *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 38, 21 Atl. 690. See dissenting opinion of Allen, J., in *Pierce v. Drew*, *supra*, at p. 88:

"An argument has been drawn from the judicial sanction which has been given to the use of streets for drains and sewers, and for gas and water pipes. But there is a

palpable distinction between such uses and that for the establishment of a telegraph line. * * * Then, again, sewers and drains are built more directly by public officers, and usually are of direct benefit to the abutting estates, as well as to the streets themselves. The advantage to abutting owners is so apparent, that, under our statutes, they may be assessed for the expenses of construction. Gas-pipes also are likely to be of direct service in furtherance of the purposes for which streets are laid out, aiding public travel, and benefiting the abutting lots. There is a general recognition that all these uses are directly subservient to the purposes for which highways are established; and, by statute, towns are authorized or required to lay water-pipes, erect watering troughs and fountains, set out and maintain shade trees, erect guide-posts, and erect and maintain street lamps. *Pub. Sts. c. 27, ss. 37, 50; c. 53, ss. 1-4; c. 54, s. 9*. But the erection of telegraph lines along a highway is of no direct and peculiar benefit to travelers upon the highway, to the highway itself, or to abutting estates; and, as has been seen, such lines do or may interfere materially with the beneficial use and enjoyment which the owner of the soil might otherwise have of his estate."

The power to decide ultimately upon the grant is usually delegated to local authorities. Their discretion varies in the different states from a general authority over the entire matter of street franchises, to a narrow authority to consent or refuse to consent to the use of streets by corporations which are otherwise empowered and governed by statute.

A local agency cannot grant a valid street franchise unless it has plain authority from the legislature, either in express words or by necessary implication to do so. The generally accepted view is that the usual power in general terms to improve, control and regulate the use of streets, does not give authority to confer street-railway franchises.⁵²

Where a local agency is invested with authority to grant or consent to a street franchise, it may impose reasonable conditions. Such conditions often operate to reserve to the municipality a large measure of control over a public-service corporation.⁵³

§ 66. Police ordinances regulating the use of streets and franchise companies.—The general power to pass police ordinances usually possessed by a municipal corporation, as well as the power often granted to such corporations to care for and regulate the use of public ways, gives authority to enact reasonable regulations having for their object the convenience, comfort, health and safety of the public in the use of streets. Ordinances may be passed limiting speed;⁵⁴ prohibiting the use of certain streets by a designated class of vehicles⁵⁵ or for transportation of particular matter;⁵⁶ forbidding the standing of vehicles for

⁵² *Domestic Telegraph Co. v. Newark*, 49 N. J. L. 344, 8 Atl. 128, and cases cited; *Newell v. Minneapolis, etc. R. Co.*, 35 Minn. 112, 27 N. W. 839; *Davis v. New York*, 14 N. Y. 506; *Mihhan v. Sharp*, 27 N. Y. 611; *State v. Trenton*, 36 N. J. L. 79; *Boston v. Richardson*, 13 Allen 146. Compare, 2 Dillon, *Mun. Corp'ns* (4th ed.) § 719. See Andrews, *American Law*, § 410.

⁵³ *Northern Central R. Co. v. Baltimore*, 21 Md. 93; *Springfield v. Springfield St. Ry. Co.*, 182 Mass. 41, 64 N. E. 577; *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33 (and note); *Pacific Ry. Co. v. Leavenworth*, 1 Dillon, C. C. 393; *Indianola v. G. W. T. & P. R. Co.*, 56 Tex. 594.

⁵⁴ *Comm. v. Worcester*, 3 Pick. 462.

⁵⁵ (*Omnibus*) *Comm. v. Stodder*, 2 Cush. 562; (*automobiles*) *Comm. v. Kingsbury*, 199 Mass. 542; or may assign portions of a street to a designated kind of travel; *Kohlhof v. Chicago*, 192 Ill. 249, 61 N. E. 446.

⁵⁶ *Vandine*, Petr. 6 Pick. 187.

longer than a certain period of time;⁵⁷ regulating the use of streets by abutters during building operations,⁵⁸ or for the loading and unloading of goods; regulating bay windows, signs, and like overhead projections jutting into streets;⁵⁹ compelling occupants of abutting property to clean sidewalks of snow and ice;⁶⁰ forbidding smoking in the streets, or spitting on sidewalks.⁶¹ A municipality may also, where its grant of power is full and complete and the matter is not otherwise regulated, exercise a large control over the activities of public service corporations;⁶² may, for example, limit the speed of trains within city limits;⁶³ require gates or flagmen at crossings;⁶⁴ even, in some states, require a railroad to elevate its tracks or to depress them below a street crossing.⁶⁵ Control of street-franchise companies is bet-

⁵⁷ *Comm. v. Brooks*, 109 Mass. 355.

⁵⁸ *Wood v. Mears*, 12 Ind. 515.

⁵⁹ *Livingston v. Wolf*, 136 Pa. St. 519, 20 Am. St. R. 937, 20 Atl. 551; *Reimer's App.* 100 Pa. 182; (under express authority) *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597. See also, *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603.

⁶⁰ *In re Goddard*, 16 Pick. 504; *State v. McMahon*, 76 Conn. 97, 55 Atl. 59; *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480.

Contra, *State v. Jackman*, 69 N. H. 318, 41 Atl. 347, and see cases cited; *Gridley v. Bloomington*, 88 Ill. 554; *Chicago v. O'Brien*, 111 Ill. 532. An ordinance may require abutters to prevent the flow of water from springs upon their lands into the streets. *Skaggs v. Martinsville*, 140 Ind. 476, 49 Am. St. R. 209, 49 N. E. 241.

⁶¹ The Kansas supreme court has held that citizens have a common right to parade the streets of which they cannot be deprived by ordinance. *Anderson v. Wellington*, 40 Kas. 173, 19 Pac. 719. But the California court decided differently

as to the beating of drums. *In re Flaherty*, 105 Cal. 558, 38 Pac. 981; and see cases cited.

⁶² (Requiring street-railway companies to remove snow, dirt, etc.) *Chicago v. Union Traction Co.*, 199 Ill. 259, 65 N. E. 243; (requiring street railway companies to have conductors on all cars). *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076; *State v. Sloan*, 48 S. C. 21, 25 S. E. 898.

⁶³ *Textor v. Baltimore & O. R. Co.*, 59 Md. 63; *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Buffalo v. N. Y., Lake Erie & W. R. Co.*, 152 N. Y. 276, 46 N. E. 496; *Larkin v. Burlington, Cedar Rapids and Northern R. Co.*, 85 Iowa, 492, 52 N. W. 480. See further, *Hayes v. Michigan Central R. Co.*, 111 U. S. 228. An ordinance which limits the speed of trains is not an unlawful interference with interstate commerce, and the transportation of United States mails. *Chicago & Alton R. Co. v. City of Carlinville*, 200 Ill. 314, 65 N. E. 730.

⁶⁴ *Chicago & N. W. Ry. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109.

⁶⁵ *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013.

ter secured, however, by reservations in the conditions of their franchises.⁶⁶ All such regulations are, of course, subject to the general rule against unreasonableness.

§ 67. Vacation: Power of municipal authorities.—The legislative power to vacate streets is usually expressly conferred upon municipalities in the general grant of authority over public ways. Without an express mention of the power, it will not, as a rule, be deemed to vest.⁶⁷

The vacation of a street involves a legislative function only; consequently the determination of a city council as to the advisability of exercising the power is final, if it be reasonable.⁶⁸ As a rule, no one whose rights are merely those of a member of the public is entitled to damages or can complain of the decision to close a street; for example, though the closing of a street, or a portion of a street, makes it more inconvenient to reach property situated on another street, or on another portion of the same street, no legal right of the owners of such property is infringed.⁶⁹

§ 68. Vacation: Rights of abutters.—In some cases, it has been assumed or decided that the power to vacate and stop up a public way is superior to any easement of abutters for access, light and air; and that even a complete shutting off of abutting property from connection with the public ways by the closing of a street would not entitle the owners to damages or to an injunction.⁷⁰ But the tendency seems to be to recognize the abutter's easement as a property right superior to the authority of the government to shut off all access to his land, and to require

⁶⁶ See § 65, *supra*.

⁶⁷ *Louisville v. Bannon*, 99 Ky. 74, 35 S. W. 120; *Hoboken Land, etc., Co. v. Mayor*, 36 N. J. L. 540.

⁶⁸ *Glasgow v. St. Louis*, 107 Mo. 198; *Kokomo v. Mahan*, 100 Ind. 242.

⁶⁹ *McGee's App.* 114 Pa. 470, 8 Atl. 237; *Polack v. Trustees*, 48 Cal. 490; *Coster v. Albany*, 43 N. Y. 399; *Fearing v. Irwin*, 55 N. Y. 486; *Kimball v. Homan*, 74 Mich. 699, 42 N. W. 167; *Gerhard v. Commrs.*, 15 R. I. 334; *E. St. Louis*

v. O'Flynn, 119 Ill. 200. Compare *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626; *In re Melon St.*, 182 Pa. 397, 38 Atl. 482, 38 L. R. A. 275. The fact that such owners have been assessed for betterments due to the opening of the street gives them no additional right. *Chicago v. Union Building Ass'n*, 102 Ill. 379.

⁷⁰ *Levee Dist. v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; *Selden v. Jacksonville*, 28 Fla. 558, 14 L. R. A. 370 (see note).

that when that is done compensation be paid him as for a taking.⁷¹ Some authorities have tried to distinguish the cases in which the street was established by dedication by the original owner of a tract of land, who had platted the tract and sold abutting lots to various purchasers, on the ground that in such cases the abutter had acquired a private equitable easement not dependent on the public nature of the way.⁷²

Statutes often provide expressly, or are construed to provide, that damages shall be paid to abutters for any injury to property caused by vacating a street.⁷³

⁷¹ *Egerer v. N. Y. Central, etc., R. Co.*, 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381; *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. 307; *Pearsall v. Eaton Co.*, 74 Mich. 558, 42 N. W. 77; *Bannon v. Rohmeiser*, 90 Ky. 48, 29 Am. St. R. 355, 13 S. W. 444; *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761; *Indianapolis v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Elliott, Roads and Streets* (2nd ed.) § 877. Even in case the property also borders on another street (corner lot). *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626; but see cases cited to last section.

⁷² *Levee Dist. v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; and see *Bradbury v. Walton*, 94 Ky. 163, at 167.

⁷³ *State Lunatic Hospital v. Worcester Co.*, 1 Met. 487; *Butterworth v. Bartlett*, 50 Ind. 537; *In re Concord's Petition*, 50 N. H. 530; *In re Melon St.*, 182 Pa. 397, 38 Atl. 482, 38 L. R. A. 275.

CHAPTER VIII.

MUNICIPAL IMPROVEMENTS AND SERVICES.

§ 69. Measures of state government.	§ 73. Wharves and ferries.
70. Measures of purely local concern.	74. Powers of school boards: Text-books.
71. Contracts for water and light.	
72. Power to maintain water-works, and light-plants.	

§ 69. Measures of state government.—We have seen that, beside caring for streets and highways, a municipal corporation administers a number of *other functions of state government* within its territory—many under the police power of the state. It establishes schools, supports dependent classes, maintains health, police, and fire-departments, militia, courts, and sometimes wharves and bridges. These are services in which the general public is directly interested. Recently the practice has grown of assigning some of them—especially school, health, and police departments—to independent boards of officers, governed directly by statute, and, in the case of police departments, appointed by the governor. As they are matters of state interest, any local agency charged with the care of them acts merely as an agency of state government, whether its authority be permissive or imperative.¹

In most cases these undertakings are covered by some clause in the municipal charter. How far the delegation of a general police power would alone authorize school, health, police, or fire service, depends on the view taken in the particular jurisdiction.² The maintenance of militia companies and armories requires express authority,³ and in executing such authority the local government acts as an agent of the state.⁴ Usually all undertakings

¹ See cases in the chapter on "Legislative Control"; especially *Commonwealth v. Plaisted*, 148 Mass. 375; *People v. Hurlburt*, 24 Mich. 44.

² As to fire engines, see *supra* § 54.

³ *Stetson v. Kempton*, 13 Mass. 272; *Clafin v. Hopkinton*, 4 Gray, 502.

⁴ *Chicago v. Chicago Ball Club*, 196 Ill. 54.

which are customarily matters exclusively for the attention of the central state government require express authority; for example, the stimulation of patriotism by means of patriotic celebrations,⁵ the entertainment of public guests.⁶

§ 70. Measures of purely local concern.—Municipal corporations were originally organized to administer to the internal needs of a compact, urban population, as a community separate and distinct from the public at large. Some of the needs which they attended to came to be later the proper concern of the state governments, under the principle of the last section. But they maintained many works of local service of such a nature as to be of purely local interest; and in which, since the establishment of state governments, it has been considered the state or the public at large has no direct interest.⁷

Many of these works are so sanctioned by those usages which are impliedly confirmed by our constitutions and general statutes, as to require no special or express authorization. Of this class are market-houses, hay scales, town pumps, town clocks, commons, playgrounds, cemeteries, fire engines, town and city halls, and even sewers.⁸ It is customary to seek for some particular clause in a charter to justify a work of this class, (but even then it is usage that governs the construction); for example, to place the maintenance of sewers under authority to keep streets in repair, even where they are largely for the service of abutters;⁹ or under the power to pass police measures to protect health;¹⁰ to put fire service,¹¹ and markets,¹² under the police power.

In modern times, other enterprises of purely local concern have been added to this class by express statutory authority; such as

⁵ *Hodges v. Buffalo*, 2 Denio, 110; *Hood v. Lynn*, 1 Allen, 103; *Liberty Bell*, 23 Fed. 843.

⁶ *Gamble v. Watkins*, 7 Hun. 448.

⁷ See *Andrews, American Law*, § 403; 1 *Dillon, Municipal Corporations* (4th ed.), § 66 *et seq.*; *Goodnow, Municipal Home Rule*.

⁸ *Spaulding v. Lowell*, 23 Pick. 71; (city hall) *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132; (town clock) *Willard v. Newbury-*

port, 12 Pick. 227; (fire engines) *Allen v. Taunton*, 19 Pick. 485; (sewers) *Boston v. Shaw*, 1 Met. 130; (artesian well) *Livingston v. Pippin*, 31 Ala. 542.

⁹ *Cone v. Hartford*, 28 Conn. 363; *Fisher v. Harrisburg*, 2 Grant's Cases (Pa.), 291.

¹⁰ See 2 *Dillon, Municipal Corp'ns*, (4th ed.), § 806.

¹¹ *Supra*, § 54.

¹² *Supra*, § 53.

libraries, hospitals,¹³ waterworks, gas and electric light systems.

§ 71. Contracts for water and light.—The power to light the streets and public places, which is generally conferred upon municipalities, is usually exercised, either under implication of authority or under authority in terms, by a contract with an individual or a corporation for a supply of gas or electric light; and the contract necessarily includes a grant to the latter of the right to use the streets. Similarly, the power to extinguish fires and to supply public buildings with water is exercised by making a contract for a supply of water, which also involves a franchise. The statutory authority in these cases usually extends to contracting also for supplying light and water to the inhabitants. The rule limiting the period of time which the arrangement may cover is given in a later section.¹⁴ By the terms of these contracts, and by conditions inserted in the grant of street franchises, municipalities often reserve power to regulate by ordinance the rates charged to consumers.¹⁵ Regulations under a reservation must, of course, be reasonable. The general power of the legislature to regulate rates of public service corporations cannot be wielded by a local corporation unless an express grant of the power has been made to it;¹⁶ and under such an express grant the municipality is limited by the rule against unreasonable ordinances, as well as by the constitutional limitation which restricts the legislature, in such cases, from making such reductions as operate to confiscate property.¹⁷

How far a municipality may bind itself against regulating or questioning the rates of such franchise companies by fixing a rate in the original ordinance or contract, will be considered in a later section.¹⁸

¹³ But no express authority is necessary to establish and maintain libraries or hospitals under trusts. See *supra*, § 44.

¹⁴ See *infra*, §§ 77, 78.

¹⁵ See *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 180 Ill. 235, 54 N. E. 224; *S. C.* 180 U. S. 619; *Freeport v. Freeport Water Co.*, 186 Ill. 179, 57 N. E. 862; *S. C.* 180 U. S. 588.

¹⁶ *In re Pryor*, 55 Kan. 724, 29 L. R. A. 398. Authority to provide

for lighting the streets and furnishing the inhabitants with gas or other light, and "to regulate and control the use thereof," will not enable the city to enact ordinances fixing the price of gas to be charged consumers. *Tacoma Gas & Elec. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

¹⁷ *Chicago, M. & St. P. Ry. Co. v. Minn.*, 134 U. S. 418; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262.

¹⁸ See *infra*, §§ 77, 78.

§ 72. Power to maintain water-works and gas and electric-light plants.—Power to purchase or erect these plants for service to the corporation and its inhabitants individually, is not possessed by a municipal corporation, according to the better view, unless specially granted. The use of streets and the power of eminent domain are usually required. But the decisions, under various laws and practices, are not in harmony. An Indiana decision¹⁹ and a Massachusetts one²⁰ present the extremes of the degrees of liberality in judicial views on the subject. The Indiana court held that the mere incorporation of a city confers impliedly the general police power of the state, which includes authority to light streets in order to prevent crime, and to sell electric-light to inhabitants in order to preserve their health, and that it is necessarily incidental that the corporation should maintain a plant of its own for these purposes. The Massachusetts decision is to the effect that an early statute giving to a town authority “to maintain street-lamps,” does not enable it to maintain an electric-light plant for the purpose of supplying street-lights. Both cases have been criticized in a well reasoned Nebraska decision,²¹ which held that express authority to light streets contained authority to maintain a plant, but did not give authority to supply service to inhabitants for domestic purposes. Many courts have decided that power to provide for “lighting the streets,”²² or “to provide the city with water,”²³ will authorize a city to construct its own plant for that purpose.

There is no doubt of the power of the legislature to authorize cities to purchase or construct such plants.²⁴ The erection of an

¹⁹ *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849.

²⁰ *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421.

²¹ *Cristensen v. Fremont*, 45 Neb. 160, 63 N. W. 364. The Indiana decision is clearly contrary to the general view. *White v. Meadville*, 177 Pa. 643.

²² *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; *Saginaw G. L. Co. v. Saginaw*, 28 Fed. Rep. 252; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268.

²³ *Atlantic City W. W. v. Atlantic City*, 39 N. J. Eq. 367; *Hall v. Houghton*, 8 Mich. 451; *Smith v. Mayor*, 88 Tenn. 464; *Putnam v. Grand Rapids*, 58 Mich. 417.

²⁴ *Mitchell v. Negaunee*, 113 Mich. 359, 71 N. W. 646; *Opinion of Justices*, 150 Mass. 392, 8 L. R. A. 487; *Linn v. Chambersburg*, 160 Mass. 511, 25 L. R. A. 217; *Peabody v. Westerly Water Works Co.*, 20 R. I. 176, 37 Atl. 807. Supplying the inhabitants with light and water is a municipal function which may properly be delegated

electric-light plant to supply a city with light for use in the streets and public places and in the homes and places of business of the inhabitants is a municipal purpose for which bonds may be issued and taxation authorized.²⁵ There is authority to the effect that to furnish the inhabitants with light, would be to engage in a private enterprise.²⁶ But, as has been said,²⁷ for a city to meet the demand for wholesome water "is to perform a public act and confer a public blessing. * * * It is not strictly a governmental or municipal function which every municipality is under obligation to assume and perform, but it is very closely akin to it, and should always be recognized as within the scope of its authority unless excluded by some positive law. * * * It cannot be said that the city in doing so is engaging in a private enterprise or performing a municipal function for a private end." A city with authority to furnish water for its inhabitants has no authority to carry water outside of its limits for the purpose of supplying the inhabitants of another municipality.²⁸ But when a town succeeds to the business of a water company under a statute which authorizes it to furnish water to any person or corporation within its limits, it may deliver water to the corporation within its limits, although a part of the water is used beyond the city limits and in another municipal corporation.²⁹

The reservation in the grant of a franchise to a water company of a *right* to purchase the plant at any time after the lapse of a stated period imposes no duty upon the town to purchase, and does not justify the inference that the city can only provide itself with water-works by purchasing from the company.³⁰ It has re-

to a municipality. *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Opinion of Justices*, 150 Mass. 392, 8 L. R. A. 487; *Tacoma v. Tacoma L. & W. Co.*, 15 Wash. 499; *Long v. Duluth*, 48 Minn. 280, 51 N. W. Rep. 913; *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. Rep. 935. As to lighting public buildings, see *St. Paul G. L. Co. v. McCardy*, 62 Minn. 509.

²⁵ *Jacksonville v. Electric Light Co.*, 36 Fla. 229, 30 L. R. A. 540.

²⁶ *Maudlin v. Greenville*, 33 S. C. 1, 8 L. R. A. 291.

²⁷ *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469; *Fire Ins. Co. v. Keeseville*, 148 N. Y. 46; *Jacksonville Elec. L. Co. v. Jacksonville*, 36 Fla. 229, 30 L. R. A. 540; *Thompson-Houston Elec. L. Co. v. Newton*, 42 Fed. Rep. 723.

²⁸ *Haupt's Appeal*, 125 Pa. St. 211, 3 L. R. A. 536.

²⁹ *Lawrence v. Methuen*, 166 Mass. 206.

³⁰ *Long v. Duluth*, 49 Minn. 280; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381.

cently been held that a statute allowing a city to acquire a water plant only by purchase from private parties to whom it has granted a franchise or with whom it has entered into a contract is in violation of a constitutional provision prohibiting the legislature from levying a tax upon the people of a municipality for a municipal purpose without their consent.⁸¹ A city may condemn the plant of a private gas or water company under the power of eminent domain.⁸² In Pennsylvania it is held that when a borough has contracted with a water company for a supply of water and reserved the right to purchase the plant after twenty years, and the company has laid its pipes and mains in the streets, it cannot during that period erect and maintain a system of water-works of its own.⁸³

§ 73. Wharves and ferries.—A city cannot carry on a public wharf or ferry and charge tolls and fees for its use without special authorization by the legislature.⁸⁴ “It is a power of a special and extra-municipal nature.”⁸⁵ The right to erect and regulate wharves and appoint wharfingers may include the right to impose and collect toll.⁸⁶

§ 74. Powers of school boards—Text-books.—The powers of school boards and trustees are purely statutory,⁸⁷ and vary greatly in the different states. The board generally has authority to prescribe the text-books which shall be used in the district. The

⁸¹ *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

⁸² *In re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 271.

⁸³ *Metzger v. Beaver Falls*, 178 Pa. St. 1; *White v. Meadville*, 177 Pa. St. 643, 34 L. R. A. 567; *Wilson v. Borough of Rochester*, 180 Pa. St. 509. But this was on the ground that the borough in choosing to contract rather than erect a plant, had exhausted the discretion given by the statute as to how it should procure a supply of water. As to power to make a contract excluding itself from competition with a water company for a term of years, see *infra*, § 77.

⁸⁴ *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62; *The Geneva*, Am. Law Reg., Sept., 1883, annotated; *Railroad Co. v. Ellerman*, 105 U. S. 166; *Turner v. People's Ferry*, 21 Fed. 90; *Williams v. New York Ferry Co.*, 105 N. Y. 419; *Snyder v. Rockport*, 6 Ind. 237.

⁸⁵ 1 Dillon, *Mun. Corp.* (4th ed.), § 67; *The Wharf Case*, 3 Bland Ch. 361; *The Empire State*, 1 Newb. Adm. 541.

⁸⁶ *Municipality v. Pease*, 2 La. Ann. 538; *Muscatine v. Hershey*, 18 Iowa, 39. As to the proper uses of a public wharf, see *Illinois v. Canal Co.*, 2 Dill. (C. C.) 70.

⁸⁷ *Barry v. Good*, 89 Cal. 215.

duty of establishing and maintaining a "general, uniform and thorough system of public free common schools," imposed by the constitution upon the legislature, does not necessarily imply that that body shall establish and maintain a uniform system of text-books throughout the state. A uniform system of free common schools does not require that the text-books used in the schools shall be uniform throughout the state.³⁸ When the legislature has not prescribed what books shall be used, and has not delegated the power to any other person or body, the trustees of a school district may do so by virtue of the general control over the school given them by statute.³⁹ The power may be delegated by the legislature to a school-book commission.⁴⁰ An act of the legislature prescribing the text-books which shall be used in the public schools does not violate the right of local self-government. It is a power which may be conferred upon a school board, and in such case the courts will not interfere.⁴¹ The state may prescribe the text-books and make an exclusive contract to furnish the books for a certain term.⁴² The school directors may be compelled by *mandamus* to introduce the books which have been adopted according to statute,⁴³ and a pupil may be suspended for refusing to procure a prescribed book.⁴⁴ A parent cannot insist that his child shall be permitted to use a text-book other than that

³⁸ *Campana v. Calderhead*, 17 Mont. 548, 36 L. R. A. 277, 44 Pac. 84; *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *State v. Haworth*, 122 Ind. 462, 7 L. R. A. 240; *State v. Womack*, 4 Wash. 19; *Effingham v. Hamilton*, 68 Mich. 523; *Reno County School District v. Shadduck*, 25 Kan. 467; *Topeka Board of Education v. Welch*, 51 Kan. 797; *Powell v. Board of Education*, 97 Ill. 375, 37 Am. Rep. 123; *Richards v. Raymond*, 92 Ill. 612, 34 Am. Rep. 151.

³⁹ *Campana v. Calderhead*, 17 Mont. 548, 36 L. R. A. 277, annotated, 44 Pac. 84; *State v. Webber*, 108 Ind. 31, 58 Am. Rep. 30; *State v. Dixon County School District*, 31 Neb. 552.

⁴⁰ *State v. Bronson*, 115 Mo. 271.

⁴¹ *Cincinnati Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233.

⁴² *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *State v. Haworth*, 122 Ind. 462, 7 L. R. A. 240; *State v. Blue*, 122 Ind. 600.

⁴³ *State v. Roberts*, 74 Mo. 21. For the construction of particular statutes regulating the adoption of text-books, see *Iverson v. Indianapolis School Commissioners*, 39 Fed. Rep. 735; *People v. State Board of Education*, 49 Cal. 684; *Jones v. Detroit Board of Education*, 88 Mich. 371.

⁴⁴ But see *Ruilson v. Post*, 79 Ind. 567; *Trustees v. People*, 87 Iowa, 305.

prescribed by the board.⁴⁵ The reading of the Bible as a textbook in the public schools violates the constitutional provision prohibiting sectarian instruction,⁴⁶ but a requirement that the Bible shall be used as a mere reading book is valid.⁴⁷ A school board may prescribe reasonable regulations for the health of the children and the community.⁴⁸ For this purpose it may require all pupils to be vaccinated as a condition precedent to the right to attend school, although there are no present indications of an epidemic.⁴⁹ But it has been held that such a requirement is unreasonable, unless it appears that small-pox actually exists or there is reasonable cause to anticipate its appearance.⁵⁰

⁴⁵ *Lake View School Trustees v. People*, 87 Ill. 303. See *Reno County School District v. Shadduck*, 25 Kan. 467; *Dobbs v. Stauffer*, 24 Kan. 127.

⁴⁶ *Weiss v. Edgerton School District Board*, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41, note, p. 69. As to what constitutes a sectarian school, see *Cook Co. v. Industrial School*, 125 Ill. 540, 8 Am. St. Rep. 386, annotated.

⁴⁷ *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256. See *Board v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233. A statute to the effect that the Bible shall not be excluded, but that no pupil shall be required to

read it contrary to the wishes of his parents, is constitutional. *Moore v. Monroe*, 64 Iowa, 364, 52 Am. Rep. 444.

⁴⁸ *Duffield v. Williamsport School District*, 162 Pa. St. 476, 25 L. R. A. 152.

⁴⁹ *Bissell v. Davidson*, 65 Conn. 183, 29 L. R. A. 251.

⁵⁰ *Potts v. Breen*, 167 Ill. 67, 60 Ill. App. 201, 47 N. E. 81. Power of school directors to contract, see *Everts v. District Township*, 77 Iowa, 37, 14 Am. St. Rep. 264. As to separate schools for black and white children, see *Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895, annotated.

CHAPTER IX.

DELEGATION AND RESTRICTION OF POWER AND ALIENATION OF PROPERTY.

§ 75. Delegation of discretion.

76. Illustrations.

77. Restricting future exercise of discretion.

78. By contract for a term of years.

§ 79. By exclusive privileges.

80. Power to sell and convey property.

81. Power to let for income.

82. Alienation by law: Creditors.

§ 75. Delegation of discretion.—As discretionary powers conferred by the legislature upon a public corporation are in the nature of public trusts, and the legislative intention must be to repose confidence in the action of the corporate body, the general rule is that the corporation must itself exercise such powers, and cannot delegate them to any other body or person.¹ But a distinction is made between acts which involve discretion and those which are merely ministerial in their nature. Thus, in a case² which involved the rights of a council to direct the mayor and chairman of the committee on streets and alleys to make a contract on behalf of the city for the construction of sidewalks, it was said: “It is true that the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case. The council directed the pavements, ordering them to be constructed of one or the other of several materials, but giving to the owners of abutting lots the privilege of selecting which, and reserving to the chairman of the committee authority to select, in case the lot-owners failed. The council also directed how the preparatory work should be done. There was, therefore, no unlawful delegation of power.”

¹ *St. Louis v. Russell*, 116 Mo. 653; *Lauenstein v. Fond du Lac*, 28 248, 20 L. R. A. 721 and note; *Wis.* 336.

Thompson v. Schermerhorn, 6 N. ² *Hitchcock v. Galveston*, 96 U. Y. 92, 55 Am. Dec. 385; *McCrowell* S. 341; 24 L. ed. 659; *Green v. v. Bristol*, 89 Va. 652, 20 L. R. A. *Ward*, 82 Va. 324.

§ 76. Illustrations.—There are many cases illustrating the principles of the preceding section. Thus, a council having authority to lease certain rooms for city purposes may appoint a committee to procure furniture and arrange the rooms.³ So the ministerial duty of caring for streets may be delegated by a city council to a street committee composed of members of the board of aldermen.⁴ The general discretion of a city council as to licensing the sale of liquor, expressly conferred on it by statute, cannot, however, be delegated to the mayor.⁵ But a city may, by ordinance, empower the mayor to issue licenses, where he is given only the ministerial power of issuing the license upon certain prescribed conditions being complied with.⁶

When the mayor and aldermen are authorized to select a "suitable site," and erect thereon a market building, they cannot delegate the discretion to choose the site to commissioners.⁷ The council cannot delegate to a board of public works a power given it, in conjunction with a board of education, to choose a school-house site.⁸ The power to determine which of several railroad companies shall receive municipal aid cannot be delegated.⁹ Nor can a city with authority to build and maintain a wharf lease the same to some person, and authorize the lessee to fix the rates of wharfage.¹⁰ A city cannot delegate its power to establish the grade of streets,¹¹ nor to prescribe the width of sidewalks,¹² nor to

³ *Edwards v. Watertown*, 24 Hun (N. Y.), 426.

⁴ *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671.

⁵ *State v. Bayonne*, 44 N. J. L. 114; *Kinmundy v. Mahan*, 72 Ill. 462; *Day v. Green*, 4 Cush. 433.

⁶ *Swarth v. People*, 109 Ill. 621.

When a city council seeks to regulate a given occupation by forbidding it unless a license be procured from an executive authority, the ordinance will be void unless it prescribes the circumstances under which the license shall be granted, the duration of the same, and the fee to be charged, if any; so as to leave to the executive officer only a ministerial duty to decide upon facts. See *Bills v. Goshen*, 117 Ind.

221, 20 N. E. 115, 3 L. R. A. 261; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; compare, *Comm. v. Parks*, 155 Mass. 531, 30 N. E. 174.

⁷ *State v. Paterson*, 34 N. J. L. 163.

⁸ *Lauenstein v. Fond du Lac*, 28 Wis. 336.

⁹ *Monadnock Ry. Co. v. Peterborough*, 49 N. H. 281.

¹⁰ *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

¹¹ *Lippelman v. Cincinnati*, 4 Ohio C. C. 327; *Thomson v. Boonville*, 61 Mo. 282; *Zabel v. Louisville*, 13 Ky. Law, 385, 17 S. W. 212, 13 L. R. A. 668.

¹² *McCrowell v. Bristol*, 89 Va. 652, 20 L. R. A. 653.

decide how and when streets shall be improved,¹³ nor to decide the kind of paving blocks which shall be used,¹⁴ nor to determine the dimensions and material of a sewer.¹⁵

§ 77. **Restricting future exercise of discretion.**—Analogous to the rule that a public corporation cannot *delegate* a discretionary authority, is the rule that it cannot *restrict* the future exercise of a discretionary authority of a governmental nature. Thus, in the example given in the last section, where a city leased a wharf for a term of years by a lease which purported to empower the lessee to fix the rates for wharfage, the restriction put upon the city's future control over the wharf and the wharfage also invalidated the lease.¹⁶

The corporation cannot, by contract, disable itself from using its governmental discretion, or from performing an imperative duty laid upon it by statute. Thus, a city is not liable for breach of the covenant of quiet enjoyment contained in a lease by it of land for cemetery purposes because, in the interests of public health, it has passed a subsequent ordinance prohibiting the use of the cemetery for burial of the dead. The police power of the corporation is superior to the obligation of the lease; the ordinance has an effect similar to that of a statute which makes illegal the performance of a contract of private individuals.¹⁷ A city is not liable upon such a covenant if it afterward takes part of the leased land by right of eminent domain.¹⁸

¹³ Richardson v. Heydenfeldt, 46 Cal. 68; Chase v. Sheerer, 136 Cal. 248, 68 Pac. 768; Ruggles v. Collier, 43 Mo. 353.

¹⁴ Smith v. Duncan, 77 Ind. 92; Hydes v. Joyes, 4 Bush, 464, 96 Am. Dec. 311.

¹⁵ St. Louis v. Clemens, 43 Mo. 395.

¹⁶ "The legislative authority of the city could not be delegated, nor could the city abdicate its control over the public property held in trust by it for the benefit of the public." Matthews v. Alexandria, 68 Mo. 115. See on the general principle, Illinois Canal Co. v. St. Louis, 2 Dillon, 84; Oakland v. Carpenter, 13 Cal. 540; Gale v. Kala-

mazoo, 23 Mich. 344; Illinois S. & T. Co. v. Arkansas City, 76 Fed. 271, and cases cited; Brenham v. Brenham W. Co., 67 Tex. 543; Houston v. Houston City R. Co., 84 Tex. 581.

¹⁷ Presbyterian Church v. New York, 5 Cowen, 538, 1 Andrews, American Law, § 408.

¹⁸ Brimmer v. Boston, 102 Mass. 19. In Kendall v. Frey, 74 Wis. 26, 42 N. W. 466, the court refused to compel specific performance by a city of a condition in a deed of land to the city which required the city to erect a city-hall thereon, the council having decided upon a different site. A city cannot, by a contract with a railroad company

A city cannot bind itself not to change the grade of a street.¹⁹

But a public corporation may surrender its discretion in matters which affect or restrict it only economically. Its general power to contract necessarily involves an ability to bind itself in that respect.²⁰ A city may, under an authority in general terms, make a contract for a supply of water or gas to itself or its inhabitants for a period of time at a fixed price;²¹ and if, in an ordinance granting a franchise to a water or light company, a rate is fixed to be charged consumers, the rate cannot afterward be changed by the municipality, even under an express delegation of the legislative power to regulate rates of public service corporations.²² The contract binds the city except as to its police power, in the exercise of which it may regulate the performance of it or terminate it if necessary to do so to preserve the public health or safety.²³ Some authorities require express and clear statutory authorization to admit of a munici-

for the construction of a viaduct, bind itself not to require the company to make repairs on the same. *Northern Pac. R. Co. v. State*, 208 U. S. 583.

¹⁹ *Miller v. Kalamazoo*, 140 Mich. 494, 103 N. W. 845; *Goszler v. Georgetown*, 6 Wheat. 597, and see cases cited.

²⁰ "There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water and the like, is neither a judicial nor a legislative power, but is a purely business power." *Valparaiso v. Gardner*, 97 Ind. 1; *Cincinnati v. Cameron*, 33 Oh. St. 336; *Safety Insulated Wire, etc., Co. v. Baltimore*, 66 Fed. 140, 25 U. S. App. 166.

²¹ *Indianapolis v. Indianapolis Gas, etc., Co.*, 66 Ind. 396; *Vin-*

cennes v. Citizen's Gas Light, etc., Co., 132 Ind. 114, 31 N. E. 573; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65; s. c. 202 U. S. 453; s. c. 206 U. S. 496; *Water Co. v. Knoxville*, 200 U. S. 22; *Blair v. Chicago*, 201 U. S. 400; *Omaha Water Co. v. Omaha*, 147 Fed. 1; *Weller v. Gadsden*, 141 Ala. 642, 37 So. 682; *Gadsden v. Mitchell*, 145 Ala. 137; *Baily v. Philadelphia*, 184 Pa. St. 594, 39 Atl. 494; *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118; s. c. 180 Ill. 235, 54 N. E. 224; s. c. 180 U. S. 619; *Freeport v. Freeport Water Co.*, 186 Ill. 179, 57 N. E. 862; s. c. 180 U. S. 588.

²² *State v. Cincinnati Gas Co.*, 18 Oh. St. 262; *State v. Laclede Gaslight Co.*, 102 Mo. 472.

²³ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1.

pality's binding itself to a specific rate in an ordinance granting a franchise.²⁴

It has been held that a city, in making such a contract, may, to some extent, restrict its discretion to undertake a similar local service, in competition with the other party, by establishing a plant of its own during the term of the lease; because the authority to maintain such service is of a voluntary nature, for the local convenience of its citizens. Thus, where the maintenance of a gas-lighting plant is purely voluntary, the city may abandon the enterprise, lease the plant, and contract with the lessee that the latter may supply the service at a fixed rate for a term of years, and that the city shall not establish a plant of its own during the term.²⁵ A similar restriction against establishing a plant of its own was held valid in a contract with a water company.²⁶ But the provision may be abrogated in the exercise of the police power.²⁷

Whenever the exercise of governmental discretion by the corporation results in a termination of the contract, the other party is entitled to be compensated for any part-performance of it by him, as in the case of other contracts when performance has been made impossible by act of law.²⁸

§ 78. By contract for a term of years.—In the absence of a charter restriction,²⁹ it is not a legal objection to a contract of

²⁴ *Danville v. Danville Water Co.*, 178 Ill. 299; s. c. 180 Ill. 235; s. c. 180 U. S. 619; *Freeport v. Freeport Water Co.*, 186 Ill. 179; s. c. 180 U. S. 588.

²⁵ " * * * The city in this matter is acting in its business, not its governmental, capacity, and the owner of business property, even though a municipal corporation, may, in dealing with it make such terms as in its discretion it deems best for its interest. When the owner of a business sells it with its good-will, etc., he may agree as part of the consideration to the purchaser, not to go into the same busi-

ness again as a rival, within an agreed territory or for an agreed time. The city of Philadelphia selling its gas-making plant and good-will may do the same thing." *Baily v. Philadelphia*, 184 Pa. St. 594, at 605, 39 Atl. 494.

²⁶ *Vicksburg Water Works Co. v. Vicksburg*, *supra*; *Walla Walla v. Walla Walla Water Co.*, *supra*.

²⁷ *Walla Walla v. Walla Walla Water Co.*, *supra*.

²⁸ *Rittenhouse v. Mayor*, 25 Md. 336.

²⁹ *Indianapolis v. Waun*, 144 Ind. 175, 42 N. E. Rep. 901, 31 L. R. A. 743.

a public corporation merely that it is to remain in force for a time which will extend beyond the term of the council, or of the officers, who made it.³⁰ Almost all important municipal contracts, or ordinances in the nature of contracts, must necessarily limit future councils.³¹ But the term of the contract must always be, from the standpoint of the city's interests, a reasonable one; this, in view of all the circumstances—the size and probable development of the city, the nature of the service, the price to be paid, the probability of changes in the cost of production. And the reasonableness of the transaction, being a question of the extent of power, is for the court.³² The rule of the last section, which permits municipal corporations to contract for water and light for themselves and their inhabitants, is limited by this doctrine. For such contracts, terms of from twenty-five to thirty years are usually held reasonable.³³

§ 79. By exclusive privileges.—It is well settled that when a municipal corporation under some granted authority, grants a special franchise or privilege, such as the right to put mains,

³⁰ See cases cited in last section. *Garrison v. Chicago*, 7 Biss. 480; *New Orleans G. L. Co. v. New Orleans*, 42 La. 188; *Smith v. Dedham*, 144 Mass. 177; *Merrill, etc. Ry. Co. v. Merrill*, 80 Wis. 358; *Columbus W. W. Co. v. Columbus*, 48 Kan. 99; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Atlantic City W. W. v. Atlantic City*, 48 N. J. L. 378; *Santa Anna W. Co. v. San Buenaventura*, 56 Fed. Rep. 339. See note to *Sheldon v. Fox*, 48 Kan. 356, 16 L. R. A. 257.

³¹ In *Illinois T. & S. Bank v. Arkansas City*, 40 C. C. A. 257, 76 Fed. Rep. 271, 34 L. R. A. 518, the court said: "But it is insisted that this contract is beyond the powers of the city and void, because it grants the right to use the streets of the city to the water company, and promises to pay rental for the hydrants for twenty-one years. The proposition on which this con-

tention rests is that the members of the city council are trustees for the public; that they exercise legislative powers, and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of their right to their unrestricted exercise as the exigencies of the times might demand. * * * This proposition ignores the settled distinction between the governmental or public, and the proprietary or business, powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former."

³² *Flynn v. Little Falls, etc. Co.*, 74 Minn. 180; 1 Andrews, *American Law*, § 408.

³³ Cases cited in last section.

pipes or hydrants in streets, it cannot, without express and clear authorization, make the right exclusive.³⁴ The general rule is that the legislature alone has the power to make grants of this character exclusive, and that this authority does not vest in the municipality, unless it is clearly granted to it by its charter.³⁵ Exclusive rights of this nature are not favored. If there is any ambiguity or reasonable doubt arising from the terms used by the legislature or granting body as to whether an exclusive franchise has been conferred or authorized to be conferred, the doubt is to be resolved against the party claiming such grant.³⁶

Power to light its streets is authority to give the use, although not the exclusive use, of the streets to the party with whom the contract for lighting is made.³⁷ Power to provide a water supply,³⁸ or "to cause said city or any part thereof to be lighted with oil or gas, and to levy a tax for that purpose," will not authorize contracts giving the exclusive right to furnish water or light for a fixed period.³⁹ So a city cannot, without express authority, grant to a street railway company the sole and exclusive right to construct and operate street railways in its streets.⁴⁰

§ 80. Power to sell and convey property.—The power of a public corporation to sell and convey property not devoted to any

³⁴ *Syracuse W. Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 546; *Altgeld v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, note; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Logan v. Pyre*, 43 Iowa, 524, 22 Am. Rep. 261; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Saginaw G. L. Co. v. Saginaw*, 28 Fed. Rep. 529; *Norwich G. L. Co. v. Norwich City Gas Co.*, 25 Conn. 20; *Long v. City of Duluth*, 49 Minn. 280, and cases there cited and reviewed. *Greenville W. W. Co. v. Greenville*, 70 Miss. 669 (1890). As to power of creating monopolies, see *Saginaw Gas L. Co. v. Saginaw*, 28 Fed. Rep. 529; *City of Laredo v. Int. Bridge & T. Co.*, 66 Fed.

246, 30 U. S. (App.) 110. The state may grant an exclusive franchise. *N. O. Gas Co. v. La. Light Co.*, 115 U. S. 650.

³⁵ *Illinois Trust & Sav. Bank v. Arkansas City*, 40 C. C. A. 257, 34 L. R. A. 518, 76 Fed. 271, and cases cited.

³⁶ *Long v. City of Duluth*, 49 Minn. 280; *Nash v. Lowry*, 37 Minn. 261; *Wright v. Nagle*, 101 U. S. 791.

³⁷ *Norwich G. L. Co. v. Norwich City G. Co.*, 25 Conn. 20.

³⁸ *Altgeld v. San Antonio*, 81 Tex. 436.

³⁹ *Davenport v. Kleinschmidt*, 6 Mont. 502; *In re Union Ferry Co.*, 98 N. Y. 139.

⁴⁰ *Jackson Co. H. R. Co. v. Interstate R. Co.*, 24 Fed. Rep. 306; *Nash v. Lowry*, 37 Minn. 261.

special public purpose, or which is held only for value or income, differs in no essential respect from that of a private individual.⁴¹ Even property originally devoted to the performance of some public duty may doubtless, if the corporation has the legal and complete title, be alienated when no longer required, or whenever, in the discretion of the corporation, other property has been substituted.⁴² But a public corporation has no power, in the absence of express authority, to convey property when the conveyance will disable it from performing some public duty, especially one imperatively laid upon it by statute, or will involve an abandonment thereof.⁴³ Obviously a city could not dispose of a sewer the construction of which had been specifically required of it by statute. And a public corporation can never, without express authority, alienate property which it holds as a mere involuntary instrument of the state, or as a simple custodian for the public. Generalizations in this respect, however, must necessarily be defective and misleading; the power to convey particular property, of which the corporation has a complete legal title and which is not subject to a legal public easement, must always rest upon the nature of the property, the mode of acquisition, the conditions under which alienation is sought to be made, and the particular statutes under which the property is held.

Property dedicated to public use, or taken by right of eminent domain for public use, cannot be alienated at will while charged with such use. A city, for example, cannot grant title to an ordinary street or public square, park or common; and even though it own the fee it cannot do so unless the public easement be previously or simultaneously terminated by proper legislative action.⁴⁴

⁴¹ See e. g. (school lands) *Bowlin v. Furman*, 28 Mo. 427; (stock) *Newark v. Elliott*, 5 Ohio St. 113; *Fort Wayne v. Lake Shore, etc. R. Co.*, 132 Ind. 558, 18 L. R. A. 367, 32 N. E. 215; *Hand v. Newton*, 92 N. Y. 88. As to power to mortgage, see *Adams v. Memphis, etc. R.*, 2 Caldwell (Tenn.), 645.

⁴² *Baily v. Philadelphia*, 184 Pa. 594; *Konrad v. Rogers*, 70 Wis. 492.

⁴³ 2 Dillon, *Mun. Corp'ns* (4th ed.), § 575. *Matthews v. Alexan-*

dria, 68 Mo. 115, 30 Am. Rep. 776; *Lord v. Oconto*, 47 Wis. 386.

⁴⁴ *Hoadley v. San Francisco*, 124 U. S. 639. Even though the land was voluntarily purchased by it and afterward dedicated by it to the use of the public for a common. *State v. Woodward*, 23 Vt. 92. Compare, where easement has been terminated by statute or ordinance. *Philadelphia v. P. & R. R. Co.*, 58 Pa. St. 253; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411.

§ 81. **Power to let for income.**—A municipal corporation has a general discretion and authority to make an incidental income from its surplus or idle property. An old building owned by the corporation, but no longer needed for use, may be repaired and leased.⁴⁵ A public building or a portion thereof may be rented during periods when otherwise it would be idle; for example, a city or town hall for entertainments; ⁴⁶ basement rooms in a city hall for stores and offices.⁴⁷ So a town may sell the surplus output of a gravel-pit or a stone quarry.

§ 82. **Alienation by law—Creditors.**—It is a general principle, adopted to prevent the disabling of the public agencies, that property charged with a public use cannot, without statutory permission, be alienated by levy and sale on execution. This rule exempts from judgment liens and from seizure on execution, all such property of public corporations as is charged with a corporate duty or service, either to the general public or to the inhabitants; including “public buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks, and the like.”⁴⁸ The same exemption applies as against mechanics, maritime, and similar liens; statutes giving such remedies are construed not to be intended to apply to public or municipal property devoted to a governmental use.⁴⁹

In some states, either because statutes specify a remedy by *mandamus*, or because of the nature of these corporations as instruments of government, it is held that the remedy by execution does not lie against property of any nature owned by public corporations; and that the only remedy adaptable to the nature of the case is a writ of *mandamus* to the proper authority to com-

⁴⁵ *Bates v. Bassett*, 60 Vt. 530.

⁴⁶ *French v. Quincy*, 3 Allen, 9; *Bell v. Platteville*, 71 Wis. 139, 36 N. W. 831.

⁴⁷ *Oliver v. Worcester*, 102 Mass. 489.

⁴⁸ See 2 Dillon, *Mun. Corp'ns* (4th ed.), § 576; (hospital) *Davenport v. Insurance Co.*, 17 Iowa, 276; (schoolhouse) *Fleishel v. Hightower*, 62 Ga. 324; (public square) *Ransom v. Boal*, 29 Iowa, 68; *Lowe v. Howard Co.*, 94 Ind. 553; (water-

works) *New Orleans v. Morris*, 105 U. S. 600. Such property does not lose its immunity by a temporary abandonment of it for such a use.

Murphree v. Mobile, 104 Ala. 532.

⁴⁹ *Brickley v. Boston*, 20 Fed. 207; *Ripley v. Gage Co.*, 3 Neb. 397; *Parke Co. v. O'Conner*, 86 Ind. 531, 44 Am. Rep. 338; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Board of Education v. Neldenberger*, 78 Ill. 58.

pel payment of the judgment, or taxation if necessary.⁵⁰ In other states the remedy by levy on execution is deemed proper as against such property of a municipal corporation as is not devoted to a public use.⁵¹ An early rule in the New England states, resulting largely from the absence of any general town fund, recognized a liability upon the inhabitants of towns for the common debts; it is said to be still the rule in those states that, on execution against a town, the individual property of the inhabitants may be seized and sold.⁵²

⁵⁰ Board of Education v. Neidenberger, 78 Ill. 58; State v. Milwaukee, 20 Wis. 87; Comm. v. Allegheny Co., 37 Pa. St. 277; Crane v. Fond du Lac, 16 Wis. 196. A court of equity has no power to decree a tax against the inhabitants of a city, and collect it through an officer of the court, even where the remedy by *mandamus* is ineffective. Rees v. Watertown, 16 Wall. 107; Thompson v. Allen Co., 115 U. S. 550.

⁵¹ Brown v. Gates, 15 W. Va. 131;

Birmingham v. Rumsey, 63 Ala. 352; Darlington v. Mayor, 31 N. Y. 164, 88 Am. Dec. 248; Holliday v. Frisbie, 15 Cal. 630. See Meriwether v. Garrett, 102 U. S. 472.

⁵² School Dist. v. Wood, 13 Mass. 192; Riddle v. Proprietors, 7 Mass. 187; Chase v. Merrimack Bank, 19 Pick. 564; Adams v. Wiscasset Bank, 1 Greenlf. 361. Applied to cities, Beardsley v. Smith, 16 Conn. 368. Doctrine reviewed and repudiated, Horner v. Coffey, 25 Miss. 434.

CHAPTER X.

THE POWER OF EMINENT DOMAIN.

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| § 83. Definition. | § 91. The proceedings. |
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| 88. Meaning of property. | 96. Benefits. |
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§ 83. **Definition.**—The power of eminent domain is "that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit, without regard to the wishes of its owners. More accurately, it is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience or welfare may demand."¹

It grows out of the necessities of government and is the offspring of political necessity.² It is distinct from the police power and the power of taxation.³

The power of government based upon the eminent domain should be distinguished especially from that right which is vested in the public, and in each individual thereof, and in the proper governmental agencies as representing the public, to injure or destroy private property in cases of emergency for the purpose of averting or resisting public calamity; for example, to destroy buildings to prevent the spreading of fire. This latter right rests upon necessity, and is like that of self-defense. No com-

¹ Cooley, Const. Lim. (7th ed.) 753; Lewis, Eminent Domain, ch. 1. 189.

² Nichols v. Bridgeport, 23 Conn.

³ Kohl v. United States, 93 U. S. 367.

pensation can be recovered by property owners for such injuries unless provided for by statute.⁴

§ 84. May be delegated.—The right to exercise the power of eminent domain may be delegated to public or private corporations.⁵ Such a grant must, however, be strictly construed.⁶

§ 85. What may be taken.—Usually under a general grant of power to take lands for its purposes, a municipal corporation can, by its condemnation, take only an easement. This results from the strict construction of grants of public powers. To admit of a taking in fee, the language used by the legislature must clearly appear to authorize it, or must impliedly authorize it from the nature of the purpose for which it is specifically granted.⁷ Every species of private property may be authorized to be taken under this power. Thus, the state, or a body to which the power has been delegated, may, when necessary for a public purpose, take lands,⁸ houses,⁹ piers,¹⁰ bridges,¹¹ streams of water¹² and corporate property and franchises.¹³ Riparian rights are property which cannot be taken without compensation.¹⁴ Thus, the riparian rights of the lower owners upon the banks of a stream cannot, except in aid of navigation, be taken by the state for a public purpose without compensation.¹⁵ The legislature may de-

⁴ *Russell v. Mayor*, 2 Denio. 461; *Field v. Des Moines*, 39 Ia. 575; *Bowditch v. Boston*, 101 U. S. 16; *Parsons v. Pettingill*, 11 Allen, 507; *American Print Works v. Lawrence*, 21 N. J. L. 248.

⁵ *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. Rep. 943; *Allen v. Jones*, 47 Ind. 438; *Cooley*, *Const. Lim.* (7th ed.) 762.

⁶ *Alexandria, etc. Ry. Co. v. Alexandria*, 75 Va. 780; *Leeds v. Richmond*, 102 Ind. 372.

⁷ *Washington Cemetery Co. v. Prospect Park, etc. R. Co.*, 68 N. Y. 591; *Newton v. Perry*, 163 Mass. 319; *Dingley v. Boston*, 100 Mass. 544; *Corwin v. Cowan*, 12 Oh. St. 629; *Pittsburg, etc. R. Co. v. Bruce*, 102 Pa. St. 23.

⁸ *Bliss v. Hosmer*, 15 Ohio, 44.

⁹ *Wells v. Somerset, etc. R. Co.*, 47 Me. 345.

¹⁰ *In re Union Ferry*, 98 N. Y. 139. A lease of the wharves of a port may be taken. *Duffy v. New Orleans*, 49 La. Ann. 114.

¹¹ *Northampton Bridge Case*, 116 Mass. 442.

¹² *Reusch v. Chicago, etc. Ry. Co.*, 57 Iowa, 685.

¹³ *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507.

¹⁴ *Rumsey v. N. Y. & N. E. Ry. Co.*, 130 N. Y. 88, 15 L. R. A. 618, annotated.

¹⁵ *Kaukauna Water Power Co. v. Green Bay Canal Co.*, 142 U. S. 254; *Patten Paper Co. v. Kaukauna Water Power Co.*, 90 Wis. 370, 28 L. R. A. 443.

termine the quantity of estate which shall be taken,¹⁶ or it may delegate this power to a municipality.¹⁷ It may authorize the taking of the fee¹⁸ or of a mere easement.¹⁹ A city cannot, however, condemn lands situated beyond the corporate limits without special and clear authority to do so.²⁰

§ 86. **Must be for public use.**—It is only for public use and upon compensation made that private property may be taken under the power of eminent domain. What is a public use is always a question for the judiciary.²¹ Public roads and streets,²² parks,²³ and squares,²⁴ markets,²⁵ cemeteries,²⁶ school buildings,²⁷ water and gas plants,²⁸ sewers and drains,²⁹ almshouses and other public buildings,³⁰ are illustrations of public uses for which private property may be taken under the power of eminent domain. The use of water for the purpose of irrigation is a public use.³¹ Land cannot be taken for a purely private road. But the rule is probably otherwise where the road is to some extent public, as, for instance, where a road is opened at the instance of a private person who agrees to keep it in repair, al-

¹⁶ *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Wyoming Coal Co. v. Price*, 81 Pa. St. 156.

¹⁷ *Powers' Appeal*, 29 Mich. 504.

¹⁸ *Haldeman v. Pennsylvania Ry. Co.*, 50 Pa. St. 425.

¹⁹ *Kellogg v. Malin*, 50 Mo. 496; *Clark v. Worcester*, 125 Mass. 226.

²⁰ *Thompson v. Moran*, 44 Mich. 602.

²¹ On the general subject of public uses for which property may be taken under the power of eminent domain, see *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 20 L. R. A. 662; *Pittsburgh, etc. Co. v. Benwood Iron Works*, 31 W. Va. 710, 2 L. R. A. 680; *Barre Ry. Co. v. Montpelier, etc. Ry. Co.*, 61 Vt. 1, 4 L. R. A. 785.

²² *Wild v. Deig*, 43 Ind. 455; *Bankhead v. Brown*, 25 Iowa, 540; *Elliott, Road and Streets*, § 146.

²³ *In re Mayor of New York*, 99 N. Y. 569; *South Park Com'rs v. Williams*, 51 Ill. 57.

²⁴ *Owners v. Mayor*, 15 Wend. (N. Y.), 374.

²⁵ *In re Application of Cooper*, 38 Hun (N. Y.), 515.

²⁶ *Balch v. County Com'rs*, 103 Mass. 106.

²⁷ *Williams v. School District*, 37 Vt. 271.

²⁸ *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659; *Bailey v. Woburn*, 126 Mass. 416; *Tyler v. Hudson*, 147 Mass. 609; *State v. Eau Claire*, 40 Wis. 533; *In re Deering*, 93 N. Y. 651.

²⁹ *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Bancroft v. Cambridge*, 126 Mass. 438.

³⁰ *Lewis, Eminent Domain*, § 174.

³¹ *Bankhead v. Brown*, 25 Iowa, 545; *Welton v. Dickson*, 38 Neb. 767, 32 L. R. A. 496; *Latah Co. v. Peterson*, 2 Idaho, 1118, 16 L. R. A. 81; *Varner v. Martin*, 21 W. Va. 538.

though the public is permitted to use it.⁸² Land may be taken for a useful purpose which serves to satisfy a public want, notwithstanding the fact that the element of ornament or beauty may be a controlling consideration.⁸³

§ 87. Property already appropriated to public use.—Property which is already appropriated to a public use cannot be taken for another public use unless the statute clearly confers authority to make a second seizure.⁸⁴ Thus, under a general power, a city cannot excavate a canal across a railway yard where there are numerous tracks. “In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose,” said Folger, J.,⁸⁵ “it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded by the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use when exercised must supersede the former, it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms.”

Under general power one railway company cannot lay a track longitudinally along an existing track of another road.⁸⁶ But it may make necessary crossings over another road.⁸⁷ A public

⁸² Paxton & Hershy Co. v. Farmers', etc. Co., 45 Neb. 884, 29 L. R. A. 853; Lindsay Irr. Co. v. Mehrrens, 97 Cal. 676. As to flowage of land, see Turner v. Nye, 154 Mass. 578, 14 L. R. A. 487, and note.

⁸³ Higginson v. Nahant, 11 Allen, 532; Gardner v. Newburg Tp., 2 Johns. Ch. 162; Eldridge v. Smith, 34 Vt. 482.

⁸⁴ Cincinnati, etc. R. Co. v. Belle Centre, 48 Ohio St. 273, 27 N. E. Rep. 464; Old Colony Ry. Co. v. Farmington Water Co., 153 Mass. 561, 13 L. R. A. 333. The legisla-

ture will not be deemed to have authorized the taking of such property unless the intention is clearly expressed in the statute. People v. Thompson, 98 N. Y. 6.

⁸⁵ *In re* Buffalo, 68 N. Y. 167.

⁸⁶ Boston & M. R. R. Co. v. Lowell, etc. R. Co., 124 Mass. 368.

⁸⁷ St. Paul, etc. Co. v. Minneapolis, 35 Minn. 141; Minneapolis W. R. Co. v. M. & St. L. R. Co., 61 Minn. 502. But see Sharon R. Co.'s Appeal, 122 Pa. St. 533, and cases cited.

cemetery cannot be taken for highway purposes without express authority.³⁸ But a part of a school lot may be taken when what remains is not rendered wholly useless.³⁹ The works and franchises of a water company may be condemned by a city on the ground that they are required for a use of a higher and wider scope. "All property within the state is subject to the right of the legislature to appropriate for a reasonable and necessary use upon a just compensation being provided to be made therefor, and there can be no distinction in favor of corporations whose franchises and operations impart to them a *quasi*-public character." ⁴⁰

§ 88. Meaning of "property."—The word "property," as now understood, includes all rights which pertain to the ownership of things.⁴¹ In a leading case ⁴² it appeared that after paying the owner of land for the damages resulting from laying out a railroad across his land, the company in building its road made a deep cut through a ridge north of the land which protected it from high water in a neighboring river. In times of high water, stone and gravel were washed through the cut upon the plaintiff's land, and it was held that he could recover for this damage, notwithstanding the fact that the road had been constructed with due care. In this case, which has been pronounced "the most satisfactory and best considered case which can be found in the books on this subject," ⁴³ will be found a full discussion of what is meant by property and what is a taking of property within the meaning of the constitution.

§ 89. Necessity for taking.—How far a court may review the exercise of the discretion reposed by the constitutions in the legislature and its delegates to decide upon the appropriation of a particular piece of property to public use, is a question which has occasioned some conflict of authority. All agree that the judiciary should judge whether the use for which the property is sought is a public one; because the legislative power to take prop-

³⁸ *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234. (Pa.) 94; *Denver v. Bayer*, 7 Col. 113. See an article by Mr. Sedg-

³⁹ *Easthampton v. County Com'rs*, 164 Mass. 424. wick, in *North Am. Rev.*, Sept. 1882, vol. 135, p. 253.

⁴⁰ *In re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270.

⁴² *Eaton v. Boston, etc. R. Co.*, 51 N. H. 504.

⁴¹ *Arnold v. Hudson R. Co.*, 55 N. Y. 661; *Morrison v. Semple*, 6 Binn.

⁴³ *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, *Christiancy, J.*

erty is limited to certain purposes, and hence the question of purpose is a question of power. Nearly all are in harmony also in the view that when the power is wielded directly by the legislature the decision of that body as to the necessity or advisability of taking the property, being a decision upon a political question, is final.⁴⁴ By the great weight of authority, the decision is equally final when made by a governmental agency endowed with the power by statute; because the decision is the same political one, delegated to a subordinate judgment.⁴⁵ Leading courts have adhered to this view even where the authority was conferred in terms which, in another matter, would ordinarily make necessity an express condition to jurisdiction, and therefore the subject of judicial review; for example, "may take any lands or real estate necessary," etc.⁴⁶

The authorities are in conflict as to whether the property owner

⁴⁴ Paxton, etc. Co. v. Farmers' Co., 45 Neb. 884, 29 L. R. A. 853; Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345; Dingley v. Boston, 100 Mass. 558; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; *In re St. Paul Ry. Co.*, 34 Minn. 227. *Contra*, Stearns v. Barre, 73 Vt. 281. The constitution of Michigan requires that the necessity of taking particular land—indeed, the necessity of the improvement itself—be determined by a jury, together with the amount of compensation. Power's App., 29 Mich. 509; and see Wisconsin Const'n.

⁴⁵ Chicago, Rock Island & P. R. Co. v. Lake, 71 Ill. 333; Chicago N. W. R. Co. v. Morrison, 195 Ill. 272; State v. Stewart, 74 Wis. 630; New York, etc. R. Co. v. Long, 69 Conn. 424. *Contra*, Butte, A. & P. R. Co. v. Montana U. R. Co., 16 Mont. 504; Stearns v. Barre, *supra*; Olmstead v. Morris Aqueduct, 47 N. J. L. 328.

A court cannot pass upon the determination of a railroad as to the route of its road, or that of a city as to the location of

a street. Kansas, etc. Coal R. Co. v. N. W. Coal etc. Co., 161 Mo. 288; Struthers v. Dunkirk, etc. Co., 87 Pa. 282; Knoblauch v. Minneapolis, 56 Minn. 325; Bass v. Ft. Wayne, 121 Ind. 389. *Contra*, as to route (sewers) Santa Ana v. Gildmacher, 133 Cal. 399. The fact that other land in the vicinity could be taken more conveniently, and with less injury to property owners, is not available as a ground for contesting the taking. N. P. R. Co. v. Colo. Postal Telegraph Cable Co., 30 Colo. 133; Savannah F. & W. R. Co. v. Postal Tel. Cable Co., 112 Ga. 941.

⁴⁶ Lynch v. Forbes, 161 Mass. 302; Hayford v. Bangor, 102 Me. 340; Burnett v. Boston, 173 Mass. 173; McKennon v. St. Louis, I. M. & S. R. Co., 69 Ark. 104. See Honolulu Rapid Transit Co. v. Hawaii, 211 U. S. 282; People v. Brooklyn Heights R. Co., 172 N. Y. 90. Compare Rensselaer etc. R. Co. v. Davis, 43 N. Y. 137; and see Tracy v. Elizabethtown, etc. R. Co., 80 Ky. 259; and cases cited in note, 42 Am. St. Rep. at 408.

is entitled to a judicial decision upon the necessity for the extent or quantity of land which a subordinate agency is seeking to condemn for a proper work. There is much authority in support of the doctrine that a court may restrain, limit, or avoid a taking if it judges that more land is being appropriated than is reasonably needed.⁴⁷ But in the proper case for the application of this doctrine the issue is really as to the true nature of the use for which a part of the property is to be taken.⁴⁸ "If the amount sought to be condemned is in excess of that necessary for the improvement, the appropriation of such excess is not for the public use."⁴⁹ If it appear that the taking of the excess is for an ulterior object—speculation or profit—the question is still as to the purpose. The discretion is also limited by the rule that a discretionary authority cannot be exercised unreasonably.

§ 90. What constitutes a taking.—It is not necessary that there should be a physical taking of the property. It may be by restricting the use or depriving the owner of an incorporeal right,⁵⁰ such as by the flowing of lands or the diversion of a stream.⁵¹ The owner of land abutting on a navigable stream cannot be deprived of all access to the same without proper compensation,⁵² although it was at one time held that when the title to the bed of the stream was in the state there was no taking when the water front was appropriated for a public purpose.⁵³

⁴⁷ *Tedens v. Sanitary Dist.*, 149 Ill. 87; *Stearns v. Barre*, 73 Vt. 281; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812. *Contra*, *Pittsburg, Ft. Wayne & C. R. Co. v. Peet*, 152 Pa. 488; *No. Mo. R. Co. v. Gott*, 25 Mo. 540; *Lynch v. Forbes*, 161 Mass. 302; *Hayford v. Bangor*, 102 Me. 340.

⁴⁸ See *Jones v. Tatham*, 20 Pa. 398; *Long v. Louisville*, 98 Ky. 67. "To deny the petition it should appear that what is sought is clearly an abuse of power, and a taking of private property for an object not required for the convenient operation of the road." *So. Chicago R. Co. v. Dix*, 109 Ill. 237. It is a violation of constitutional principles for the legislature to enact that

whenever part of a lot is required for the widening of a street the entire lot may be taken and the surplus sold. *Albany Street*, 11 Wend. 148; *Baltimore v. Clunet*, 23 Md. 449.

⁴⁹ *Bennett v. Marlon*, 106 Ia. 628, 76 N. W. 844.

⁵⁰ *Pumpelly v. Green Bay, etc. Co.*, 13 Wall. (U. S.) 166; *Stephens v. Proprietors of Canal*, 12 Mass. 466; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

⁵¹ *Baltimore, etc. R. Co. v. M'Gruder*, 34 Md. 79, 6 Am. Rep. 310; *Pettigrew v. Evansville*, 25 Wis. 223.

⁵² *Railway Co. v. Renwick*, 102 U. S. 180.

⁵³ *Tomlin v. Dubuque, etc. Ry. Co.*, 32 Iowa, 106, 7 Am. Rep. 126.

A change of the grade of a street is not a taking of the property of abutting owners for public use.⁵⁴ It was at one time held that there was no taking unless there was an actual physical appropriation of the property or divestiture of the title. The damage, in order to constitute a taking, must be of such a nature as to give a cause of action on common-law principles. Thus, there can be no recovery for damages resulting from the location of a jail, although it may result in actual injury to property.⁵⁵

§ 91. The proceedings.—The proceedings which should be followed by an agency to which the discretion has been delegated, in order to accomplish a taking, are specified by statute. They may consist of merely recording a plan; but in most states they consist of proceedings begun by petition to some tribunal, followed by a hearing and the assessment of damages. The petition must show all the jurisdictional facts and substantially comply with the statute, although it is not necessary that it should be literally accurate.⁵⁶

§ 92. The tribunal to assess compensation.—In all practices, it is essential to the constitutionality of the authorizing statute that, either at some stage of the proceedings for taking, or independently of them, the property owner shall have an opportunity to have his damages fixed by an impartial judicial tribunal.⁵⁷ It may consist of a court, a court and jury, or commissioners selected by the court.⁵⁸ It is not necessary, however, that it should be a tribunal exercising judicial functions only.⁵⁹ The constitutional right to a jury trial has no application to proceedings for the condemnation of property under the power of eminent domain.⁶⁰

⁵⁴ *Talbot v. New York & Harlem R. R. Co.*, 151 N. Y. 155; *Transportation Co. v. Chicago*, 99 U. S. 635.

⁵⁵ *Burwell v. Vance Co.*, 93 N. C. 73.

⁵⁶ *State v. Morse*, 50 N. H. 9; *In re Grove Street*, 61 Cal. 438. The petition must contain an allegation that there is a necessity for taking the property. *Colville v. Judy*, 73 Mo. 651; *In re Road in Sterritt Township*, 114 Pa. St. 637.

⁵⁷ *Ames v. Lake Superior, etc. Co.*, 21 Minn. 241; *Clifford v. Commissioners*, 59 Me. 262.

⁵⁸ *State v. Jones*, 109 U. S. 513.

⁵⁹ *Shue v. Commissioners*, 41 Mich. 638.

⁶⁰ *Kohl v. United States*, 91 U. S. 375; *New York, etc. R. Co. v. Long*, 64 Conn. 424; *Martin v. Tyler*, 4 N. Dak. 278, 25 L. R. A. 838; *Brugerman v. True*, 25 Minn. 123; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466. See *Lewis, Eminent Domain*, § 311. For a discussion of "due process of law," see *Mo. Pac. Ry. Co. v. Humes*, 115 U. S. 512.

In some states, however, the constitution provides for a jury trial in such cases.⁶¹ It has been held that this provision requires an ordinary jury of twelve men,⁶² and that the legislature cannot authorize a verdict by a majority thereof.⁶³

§ 93. Notice and hearing.—Since the determination to establish a public work which will require the taking of particular land is, by the better rule, purely a political decision, the owner of the property is not entitled to any hearing on the question.⁶⁴ Consequently if the process or act designated by the statute as the mode of taking title does not take the form of proceedings which include the assessment of damages, or of judicial judgment—for example, where it is simply the filing of a plan in the registry of deeds—the owner is not entitled by constitutional rules to any prior notice of the action or to be heard against it.⁶⁵ If the taking be invalid he may attack it collaterally unless a mode of direct attack be prescribed by the statutes.

But the owner is constitutionally entitled to be heard in the assessment of compensation. The statutes must provide for notifying him of any proceedings to assess damages, and for giving him an opportunity to be heard as to the amount.⁶⁶ Where the taking is by such process as to leave the owner to bring a distinct proceeding to have his damages assessed, he is, of course, entitled to notice that his land has been taken.⁶⁷ This notice

⁶¹ *Paul v. Detroit*, 32 Mich. 108; *Williams v. Pittsburg*, 83 Pa. St. 71.

⁶² *Mitchell v. Illinois, etc. Ry. Co.*, 58 Ill. 286.

⁶³ *Jacksonville etc. Ry. Co. v. Adams*, 33 Fla. 608, 24 L. R. A. 272.

⁶⁴ *Cooley*, Const. Lim. (7th ed.), 777.

⁶⁵ *Appleton v. Newton*, 178 Mass. 276; *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94; *Kramer v. Cleveland & Pittsburg R. Co.*, 5 Oh. St. 140.

⁶⁶ "It requires no judicial condemnation to subject private property to public uses. Like the power to tax, it resides with the legislative department, to whom the delegation is made. * * * But the

constitution has fixed an indispensable condition to its exercise. Full compensation must be made to the owner, before the property can be taken. A fair and equitable mode for ascertaining the amount of this compensation, and an undoubted fund from which to pay it, must in all cases be provided, as a necessary part of the proceeding to appropriate." *Kramer v. Cleveland & Pittsburg Railroad Co.*, 5 Oh. St. 140; *Abney v. Clark*, 87 Ia. 726; *Strachan v. Brown*, 39 Mich. 168; *Neeld's Road*, 1 Pa. St. 353; *Boonville v. Ormrod's Admr.*, 26 Mo. 193; *Weymouth v. Commrs.*, 86 Me. 391; *State v. Reed*, 38 N. H. 59.

⁶⁷ *Appleton v. Newton*, 178 Mass. 276.

may be constructive as by filing records in the registry of deeds.⁶⁸ Where, as in many states, the property is taken and the compensation is fixed in a single proceeding in court, prior notice of the proceeding and a trial must be provided for or given; though the notice may be constructive, as by publication.⁶⁹

Statutory requirements as to form and manner of notice must be conformed to, to give jurisdiction over the parties,⁷⁰ unless the want of sufficient notice be waived by the appearance or conduct of the owner.⁷¹ It must be given to those who have a vested interest of record in the estate, but it need not be given to mere lienholders or to the holders of a contingent or inchoate interest.⁷² Thus, it need not be given to a judgment creditor,⁷³ or to the holder of the dower interest;⁷⁴ but it must be given to a mortgagee,⁷⁵ and to both a landlord and his tenant.⁷⁶ But this is largely governed by the language of the statute. As a general rule, "all persons who have any proprietary interest in the property taken or proposed to be taken should be made parties to

⁶⁸ "A taking of land for a public use is strictly a proceeding *in rem*, the *res* being within the jurisdiction of the State. In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings, and that there is such a probability as reasonably can be provided for, that those at a distance also will be informed. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U. S. 559, 564; *Hager v. Reclamation District No. 108*, 111 U. S. 701, 711; *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 97; *In re Union Elevated Railroad*, 112 N. Y. 61, 75; *Baltimore Belt Railroad v. Baltzell*, 75 Md. 94; *State v. Messenger*, 27 Minn. 119. It is for the legislature, within proper limitations, to say what means of knowledge will be enough to put upon a landowner the duty, within a prescribed time,

to take measures to obtain his compensation if he wishes to save his rights." *Knowlton, J.*, in *Appleton v. Newton*, 178 Mass. 276.

⁶⁹ *Cupp v. Commrs.* 19 Oh. St. 173; *Birge v. Chicago, etc. Ry. Co.*, 65 Iowa, 440; *Morgan v. Chicago, etc. Ry. Co.*, 36 Mich. 428; *Huling v. Kaw Valley R. Co.*, 130 U. S. 559.

⁷⁰ *Lewis, Em. Domain*, § 369, and c. c.

⁷¹ *Skinner v. Lake View Ave. Co.*, 57 Ill. 151; *E. Saginaw, etc. R. Co. v. Benham*, 28 Mich. 459; *Ives v. E. Haven*, 48 Conn. 272.

⁷² *Girard v. Omaha, etc. Ry. Co.*, 14 Neb. 270.

⁷³ *Gambel v. Stolte*, 59 Ind. 446; *Watson v. N. Y. etc. Ry. Co.*, 47 N. Y. 157.

⁷⁴ *City v. Kingsboro*, 101 Ind. 290.

⁷⁵ *Voegtly v. Pittsburgh, etc. Ry. Co.*, 2 Grant's Cas. (Pa.) 243.

⁷⁶ For a full treatment of this subject, see *Lewis, Em. Dcm.*, ch. XII.

the proceedings, and also all other persons, if any, who are required to be made parties by statute.”⁷⁷

§ 94. The compensation.—The compensation allowed should be the full reasonable value of the interest taken. In determining the value of land appropriated for public purposes “the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the use to which it is at the time adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property taken for public purposes, that it is perhaps impossible to formulate a rule to govern the appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rules; but as a general thing we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.”⁷⁸ The improvements upon the property should be taken into consideration.⁷⁹ Some cases hold that the owner is entitled to the market value for the use to which the land may be most advantageously applied and for which it would sell for the highest price in the market.⁸⁰ Sentimental valua-

⁷⁷ *Sherwood v. City*, 109 Ind. 410; *Severin v. Cole*, 38 Iowa, 463.

⁷⁸ *Boom Co. v. Patterson*, 98 U. S. 403, Field, J.; *Laurence v. Boston*, 119 Mass. 126; *Commissioners v. Railway Co.*, 63 Iowa, 297; *Chapman v. Oshkosh, etc. Ry. Co.*, 33 Wis. 629; *King v. Minneapolis*, 32 Minn. 224.

⁷⁹ *Jacksonville, etc. Ry. Co. v. Walsh*, 106 Ill. 253. The cost of repairs upon a toll bridge which has

been taken by the county cannot be considered. *Mifflin Bridge Co. v. Juniata Co.*, 144 Pa. St. 235, 13 L. R. A. 431.

⁸⁰ *King v. Minneapolis Ry. Co.*, 32 Minn. 224. Where a bridge is taken by a county the measure of damages is the value of the property to the owners and not to the county taking it. The owners are entitled to recover not only the cost of the structure, but also the value

tions based upon associations cannot be taken into consideration, as it is impossible to measure such matters in money.⁸¹ The jury in condemnation proceedings cannot rely upon their own judgment in the matter of damages and reject the evidence of competent witnesses.⁸²

Neither the diminished value of a stock of merchandise, nor the loss of profits caused by removal made necessary by the taking of real estate, is a proper element of damage.⁸³ The cost of adjusting a bridge erected by a railway company for the purpose of carrying its track over a street-crossing, after the street has been widened by the city under the power of eminent domain, is a proper element of damages to be allowed the company in proceedings to condemn a portion of its property for the purpose of such widening, notwithstanding the fact that an ordinance provides that the company shall erect and maintain the bridge at its own expense.⁸⁴

§ 95. Consequential injuries.—The damages resulting to the property of a person by the lawful exercise by another of his legal rights is not a taking of the property of the former. This question arises when the state engages in the improvement of rivers and highways. It has appeared in an earlier section that the prevailing doctrine is that there can be no recovery for injuries resulting from the change of the grade of a street.⁸⁵ So the owner of a fishery which is reduced in value by improvements made in a navigable stream has no remedy.⁸⁶ Mr. Justice Miller says:⁸⁷ “The doctrine that for a consequential injury to the property of an individual for the prosecution of improvements of roads, streets, rivers and other highways, there is no redress * * * is a sound one in its proper application to many injuries to property; * * * but we are of opinion that the decisions referred to have gone to the uttermost limit of sound

of the franchise. *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 54. *Belt R. Co.*, 102 Mo. 633, 10 L. R. A. 851.

⁸¹ Cooley, Const. Lim. (7th ed.) 819.

⁸² *Peoria Gas L. Co. v. Peoria R. Co.*, 146 Ill. 372, 21 L. R. A. 373.

⁸³ *Becker v. Phil. etc. R. Co.*, 177 Pa. St. 252, 25 L. R. A. 583.

⁸⁴ *Kansas City v. Kansas City*

⁸⁵ *Supra*; § 63.

⁸⁶ *Parker v. Mill Dam Co.*, 20 Me. 353, 37 Am. Dec. 56; *Commonwealth v. Look*, 108 Mass. 452.

⁸⁷ *Pumpelly v. Green Bay*, 13 Wall. 166; *Talbot v. N. Y. & Harlem R. R. Co.*, 151 N. Y. 155.

judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principles.”

§ 96. Benefits.—The cases are conflicting upon the question of the right to set off benefits which are special to particular land, against the damages awarded. Certain cases hold that such benefits cannot in any case be offset against the injury sustained by the land-owner;⁸⁸ and this principle has been incorporated in some constitutions.⁸⁹ Others allow a set-off only against incidental injuries sustained,⁹⁰ while still others allow such a set-off against the value of the land as well as against incidental injuries.⁹¹ But benefits to be allowed in any case must be of a kind not common to the public at large.⁹²

§ 97. Manner of payment.—In the absence of a constitutional requirement to the contrary, it is sufficient if an adequate and certain remedy is provided whereby the land-owner may compel payment of damages.⁹³ In a recent case⁹⁴ the court said: “Under constitutional provisions declaring that private property shall not be taken for public use without just compensation, and silent as to the time of payment, it has generally, if not universally, been held that when property was thus taken by a private corporation, payment must precede the taking; but where the property was taken directly by the state or a municipality of the state, it has generally been held a sufficient compliance with the provision if the compensation was definitely ascertained and made

⁸⁸ *Israel v. Jewett*, 29 Iowa, 475.

⁸⁹ See *Newmann v. Metropolitan, etc. Ry. Co.*, 118 N. Y. 618.

⁹⁰ *Robbins v. Milwaukee, etc. Co.*, 6 Wis. 637; *Shawneetown v. Mason*, 82 Ill. 337; *Shipley v. Baltimore, etc. R. Co.*, 34 Md. 336.

⁹¹ *Putnam v. Douglas Co.*, 6 Oreg. 328, 25 Am. Rep. 627; *Root's Case*, 77 Pa. St. 276.

⁹² *Commissioners v. Johnson*, 71 N. C. 398; *Lipes v. Hand*, 104 Ind. 503. On the general question, see *Elliott, Roads and Streets*, § 188, and cases cited.

⁹³ *Sage v. Brooklyn*, 89 N. Y. 189.

⁹⁴ *Martin v. Tyler*, 4 N. Dak. 278, 25 L. R. A. 838.

a charge upon the municipal fund for which the credit of the municipality was pledged." By many authorities, the party must not be required to resort to a lawsuit in order to collect his money.⁹⁵ Judge Cooley says:⁹⁶ "Whenever the necessary steps have been taken on the part of the public to select the property to be taken, locate the public work and declare the appropriation, the owner becomes absolutely entitled to the compensation, whether the public proceed at once to occupy the property or not. If a street is legally established over the land of an individual, he is entitled to demand payment of his damages without waiting for the street to be opened."⁹⁷ When the law expressly requires that the money shall be paid before the property is taken, there can be no valid taking until after the payment is made.⁹⁸

§ 98. Right of appeal.—It is for the legislature to say whether the land-owner shall have a right to appeal from the determination of the tribunal which is established to determine his damages.⁹⁹ It may provide for an appeal or it may make the decision final. The trial in the appellate court is *de novo*.¹ The appeal vacates the decision appealed from.² The usual remedy for reviewing erroneous proceedings is by *certiorari*, and under it only questions of law are considered.³

⁹⁵ *Shepardson v. Milwaukee, etc. R. Co.*, 6 Wis. 605.

⁹⁶ Cooley, *Const. Lim.* (7th ed.) 818.

⁹⁷ *Rogers v. Bradshaw*, 20 Johns. 744; *Bloodgood v. Mohawk, etc. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313; *Brock v. Hishen*, 40 Wis. 674; *Long v. Fuller*, 68 Pa. St. 170. The same rule has been adopted in Minnesota and Michigan, where the constitution requires that compensation shall be first paid or secured. *State v. Messenger*, 27 Minn. 119; *State v. Bruggerman*, 31 Minn. 493; *People v. Southern Mich. Ry. Co.*, 3 Mich. 496.

⁹⁸ *Martin v. Tyler*, 4 N. Dak. 278, 25 L. R. A. 838.

⁹⁹ *Simms v. Hymmes*, 121 Ind. 534; *Matter of State Reservation*, 132 N. Y. 734; *Fass v. Seehawer*, 60 Wis. 525; *Harwood v. Shaw*, 126 Ill. 53.

¹ *Hardy v. McKinney*, 107 Ind. 367.

² *Minneapolis v. Northwestern Ry. Co.*, 32 Minn. 452.

³ *Farmington River Water-Power Co. v. County Com'rs*, 112 Mass. 206; *Tiedt v. Carstensen*, 61 Iowa, 834.

CHAPTER XI.

TAXATION AND SPECIAL ASSESSMENTS.

§ 99. Power of taxation.

100. Nature of special assessments.

101. Their constitutionality.

102. Purposes for which local assessments may be levied.

103. Method of apportionment.

§ 104. By benefits.

105. The frontage rule.

106. Property exempt from taxation.

107. Collection of assessments.

108. Personal liability for assessments.

§ 99. **Power of taxation.**—The power of taxation is an attribute of sovereignty. In contemplation of law it is always imposed by the state, although it may act through the agency of a public corporation.¹ Almost all municipal corporations have power to levy taxes for certain purposes. It is ordinarily conferred in express terms,² but like other powers it may be implied. Thus, when a municipal corporation is expressly empowered to borrow money, it has implied authority to levy a tax to raise the money to meet the obligation.³ But the mere fact of incorporation does not carry with it the power of taxation.⁴ The power can be legally exercised for public purposes only.⁵ Being a governmental power it cannot be granted in

¹ *Whiting v. West Point*, 88 Va. 905, 15 L. R. A. 860, note.

² See *Ould v. Richmond*, 23 Gratt. 464, 14 Am. Rep. 139.

³ *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225. And see *Lowell v. Boston*, 111 Mass. 454, at 460.

⁴ *Cooley Taxation* (2d ed.), 464, and cases cited. In *Minot v. West Roxbury*, 112 Mass. 1, the court said: "It is well settled by our decisions that towns derive all their authority to tax their inhabitants from the statutes; if the authority to tax for a particular purpose is not found there, either in express

terms or by necessary implication, it does not exist." *Coolidge v. Brookline*, 114 Mass. 592. And see *Drummer v. Cox*, 165 Ill. 648, 46 N. E. 716.

⁵ *Lowell v. Boston*, 111 Mass. 454; *Lund v. Chippewa Co.*, 93 Wis. 640, 34 L. R. A. 131; *Wisconsin Keeley Inst. Co. v. Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55; *People v. Mayor*, 4 N. Y. 419; *Daggett v. Colgan*, 92 Cal. 53, 14 L. R. A. 474, and cases in note; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. ed. 369.

perpetuity, but may be revoked at any time.⁶ A municipality cannot, even for a consideration,⁷ exempt certain property from taxation without special legislative authority.⁸

• **§ 100. Nature of special assessments.**—The special form of taxation known as local assessments has some features which distinguish it from general taxation.⁹ Although much criticised and sometimes disapproved of, it is now settled that the legislature may authorize municipal corporations to levy special assessments upon property so situated as to be specially benefited by certain public improvements. In order, however, that a municipality may exercise this power it must be able to show legislative authority therefor. Ordinarily the statute provides in detail the manner in which the power is to be exercised. But when the power is conferred in general words it confers all the authority essential to the execution of the power by the ordinary and appropriate methods.¹⁰ Such assessments are a peculiar species of taxation, “standing apart from the general burden imposed for state and municipal purposes, and governed by principles which do not apply universally. The general levy of taxes is understood to exact contribution in return for the general benefits of government; and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and particularly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy they demand that special con-

⁶ *Williamson v. New Jersey*, 130 U. S. 189; *New Orleans v. Waterworks*, 142 U. S. 79, 35 L. ed. 943.

⁷ *Austin v. Austin Gas Co.*, 69 Tex. 180, 7 S. W. 200. But see *Grant v. Davenport*, 36 Iowa, 396.

⁸ *Whiting v. West Point*, 88 Va. 905, 15 L. R. A. 860, and note; *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383; *State v. Hannibal & St. J. R. Co.*, 75 Mo. 208; *New Orleans v. New Orleans, etc. Co.*, 35 La. Ann. 548.

⁹ *Bridgeport v. R. Co.*, 36 Conn. 255. That an assessment for benefits is in the nature of a tax is no longer questioned. *Sargent v. Tuttle*, 67 Conn. 162, 34 Atl. Rep. 1028, 32 L. R. A. 822. But power to tax will not authorize a local assessment. *Macon v. Patty*, 57 Miss. 378.

¹⁰ *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

tributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."¹¹ The levy of such an assessment must not be confounded with the exercise of the power of eminent domain.¹²

§ 101. Their constitutionality.—The cases in which the constitutionality of local assessments has been discussed turn largely upon the construction of the language of the particular constitution under consideration, and upon the method of apportionment.¹³ The right to levy such assessments is as well established as it is possible by judicial decisions to establish any legal principle.¹⁴ They do not constitute a taking of property without due process of law or without compensation to the owner.¹⁵ Due process of law does not require a judicial proceeding. There must be an orderly proceeding by a tribunal provided by law, but the determination of the proceeding, and the tribunal, rests with the legislature. It is essential, however, that the owner shall at some stage of the proceeding have an opportunity to be heard. If such provision is made, and the owner has the opportunity to be heard upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking of the property without due

¹¹ Cooley, *Taxation*, p. 606; *Duluth v. Dibblee*, 62 Minn. 18; *Brooks v. Baltimore*, 48 Md. 265. Mr. Burroughs (*Taxation*, p. 460) says: "An assessment for improvements is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement."

¹² *Raleigh v. Peace*, 110 N. C. 32; *Lewis, Eminent Domain*, § 4. For a history of the principle and a discussion of the difference between general taxation and local assessments, see *Macon v. Patty*, 57 Miss.

378. For a discussion of the justice and equity of this system of taxation, see *Municipality v. Dunn*, 10 La. Ann. 57; *Elliott, Roads and Streets*, § 370; *Hare, Am. Const. Law*, vol. I, p. 301.

¹³ *State v. Reis*, 38 Minn. 371; *Stinson v. Smith*, 8 Minn. 366.

¹⁴ See many cases cited in a note to *Ivanhoe v. Enterprise*, 35 L. R. A. 58, 29 Oreg. 245.

¹⁵ *Hoyt v. East Saginaw*, 19 Mich. 39; *Pray v. North Liberties*, 31 Pa. St. 69; *Holton v. Milwaukee*, 31 Wis. 27.

process of law.¹⁶ "Where this opportunity to be heard respecting the assessment is afforded the taxpayer in an action, there has been given him all that the guaranty of due process of law requires and secures; and he has nothing to complain of in regard to such process."¹⁷ The manner of giving notice of the proceedings may be prescribed by the legislature and may be by publication.¹⁸ It is not necessary that there should be a provision for appeal from the decision of the determining body. As said by the supreme court of Pennsylvania, such assessments "have always been regarded as a species of taxation, which, within well-defined limits is constitutional and proper, without provision for such appeals from the action of those intrusted with the duty of making or revising such assessments. The principle is too firmly settled by a long line of cases to be now shaken."¹⁹

§ 102. Purposes for which local assessments may be levied—Benefits.—The purposes for which special assessments may be made are numerous. There must exist the ordinary elements of taxation, and in addition thereto the improvement upon which the assessment is based must be productive of special local benefit to the property upon which it is assessed.²⁰ The local improvement must partake of a permanent nature, and

¹⁶ *Duluth v. Dibblee*, 62 Minn. 18.

¹⁷ *Reclamation Dist. v. Goloman*, 65 Cal. 635, 4 Pac. 678; *Paulsen v. City of Portland*, 149 U. S. 30, 37 L. ed. 637; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763; *Stuart v. Palmer*, 74 N. Y. 183; *People v. Hagar*, 52 Cal. 171. As to right of owner to interpose objections to regularity of proceedings after judgment of confirmation, see *People v. Markley*, 166 Ill. 48, 46 N. E. 742.

¹⁸ *Paulsen v. City of Portland*, *supra*; *Lent v. Tillson*, 140 U. S. 316; *County of Hennepin v. Bartleson*, 37 Minn. 343. As to sufficiency of notice, see *Lawrence v. Webster*, 167 Mass. 513, 46 N. E. 123.

As to necessity for notice, *Landis v. Borough of Vineland*, 60 N. J. L. 264, 37 Atl. 965.

¹⁹ *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348; *Harrisburg v. Segelbaum*, 151 Pa. St. 172; *Michener v. Philadelphia*, 118 Pa. St. 535; *Hammett v. Philadelphia*, 65 Pa. St. 146.

²⁰ *In re Wash. Ave.*, 69 Pa. St. 352; *Allen v. Drew*, 44 Vt. 174; *Title Guarantee & T. Co. v. Chicago*, 162 Ill. 505. The general rule is that a local assessment is constitutional only when it confers a special benefit. The cases are collected in a note, 14 L. R. A. 756. The contrary doctrine is held *In re Bonds of Madera Irrigation District*, 92 Cal. 296, 14 L. R. A. 755.

the benefit must flow from an actual improvement.²¹ Hence, a local assessment should not be made for sprinkling streets,²² or for the maintenance and repair of boulevards and pleasure ways.²³ But such assessments are often made, and it is said that they may be made for any purpose that tends to make a street more suitable and convenient for the use of the public, such as grading,²⁴ changing a grade,²⁵ paving,²⁶ altering or widening streets,²⁷ or constructing sidewalks.²⁸ Assessments to pay the cost of repaving a street are generally sustained.²⁹ So the expense of constructing drains in order to carry off stagnant water which may become detrimental to health may be met by the levy of special assessments.³⁰ And "where any considerable tract of land owned by different persons is in a condition precluding cultivation by reason of excessive moisture, which drains would relieve, it may well be said that the public has such an interest in the improvement and the consequent advancement of the general interests of the locality as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to

²¹ *In re Bonds of Madeira Irr. Dist.*, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 27 Am. St. 106.

²² *Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, and cases cited in note. *Contra*, *State v. Reis*, 38 Minn. 371, where the court said: "The only essential elements of a 'local improvement' are those which the term implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature and not enjoyed by property generally in the city. If it does this—rendering the property more attractive and comfortable, and hence more valuable for use—then it is an improvement."

²³ *Crane v. West Chicago Park Com.*, 153 Ill. 348, 26 L. R. A. 311. An assessment may be made to pay the expenses of sweeping a street. *Reinken v. Fuehring*, 130 Ind. 382, 15 L. R. A. 624.

²⁴ *Wray v. Pittsburgh*, 46 Pa. St. 365.

²⁵ *La Fayette v. Fowler*, 34 Ind. 140.

²⁶ *Schenley v. Com.*, 36 Pa. St. 29; *Petition of Burmeister*, 76 N. Y. 174; *Chadwick v. Kelly*, 187 U. S. 540, 47 L. ed. 293. In *Dewey v. Des Moines*, 101 Ia. 416, 70 N. W. Rep. 605, it is held that a street-paving improvement is a public improvement which will support a special assessment upon abutting owners regardless of benefits.

²⁷ *Jones v. Boston*, 104 Mass. 461.

²⁸ *Flint v. Webb*, 25 Minn. 93; *Sloan v. Beebe*, 24 Kan. 343; *White v. People*, 94 Ill. 604.

²⁹ *Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Sheley v. Detroit*, 45 Mich. 431; *Gurnee v. Chicago*, 40 Ill. 165; *Matter of Phillips*, 60 N. Y. 16; *In re Smith*, 99 N. Y. 424. *Contra*, see *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Wistar v. Philadelphia*, 80 Pa. St. 505, 21 Am. Rep. 112.

³⁰ *Reeves v. Wood Co.*, 8 Ohio St. 333; *People v. Haines*, 49 N. Y. 587.

stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a condition of uselessness.³¹ But under the rule of strict construction of powers to tax, authority to drain lands for public health, and to lay assessments therefor, will not support an assessment the main cost of which is for filling in land."³² Under power to make and maintain highways and streets by special assessments, a city has authority to levy such assessments for the construction of sewers and culverts on the theory that they are simply street improvements.³³ So the cost of laying water pipes may be levied upon property benefited thereby. "The benefits are local, as the use of the water must necessarily be mostly restricted to the property on the lines both for domestic purposes and the extinguishment of fires. The effect of supplying the streets with water is to enhance the value of dwelling-houses thereon."³⁴

§ 103. Method of apportionment.—The cost of a public improvement may be met in part by a general tax and in part by special assessment levied upon the property particularly benefited. In fixing the basis of apportionment between individuals, there are two methods in common use:

1. An assessment made by assessors or commissioners appointed for the purpose under legislative authority, who are to view the estates and levy the expense in proportion to the benefits which in their opinion the estates will receive from the improvements proposed.

2. An assessment by some definite standard fixed upon by the legislature itself, and which is applied to estates by measurements of length, quantity or value.³⁵

The determination of the question whether an improvement is general or local is a legislative question, and the action of a city

³¹ French v. Kirkland, 1 Paige, 117; Hagar v. Supervisors, 47 Cal. 222; Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. ed. 569; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369.

³² Cooley, Taxation, p. 618; Petition of Van Buren, 79 N. Y. 384. As to levees, see Williams v. Com-mack, 27 Miss. 209.

³³ Hungerford v. Hartford, 39 Conn. 279; Wright v. Boston, 9 Cush. 233; Grimmell v. Des Moines, 57 Iowa, 144, 10 N. W. 330.

³⁴ Allentown v. Henry, 73 Pa. St. 404.

³⁵ Cooley, Taxation, 639.

council pursuant to authority vested in it by the legislature is not subject to review by the courts. These questions must necessarily be left to the judgment of men. Thus, where the charter provided that it should be determined by a board of public works, the court said: "Their judgment is final and conclusive, and cannot be reviewed by the district court or any other tribunal unless shown to be fraudulent in fact, or unless it is made up upon a demonstrable mistake of fact."³⁶ With reference to a similar case the supreme court of Michigan said: "These officers acted within the scope of their powers, and the record contains no evidence of fraud, corrupt motive or intentional favoritism. The presumption is that in making the district and the assessment the officers of the municipality acted in good faith, and have correctly and faithfully exercised the discretion vested in them. In such case, where mistake or abuse of discretion is not manifest or demonstrable, the determination of municipal officers in whom such discretion is vested is conclusive, and it is not reviewable by the courts."³⁷

§ 104. By benefits.—The right to assess for benefits, as we have seen, is no longer open to question. When the assessment is apportioned according to the benefits accruing to the property, the legislature or the municipality, when duly authorized, may determine over what territory the benefits are diffused, or it may provide for the appointment of assessors or commissioners with authority to make the assessment upon such lands as in their judgment are specially benefited. As stated in the preceding section, the determination of questions of fact in these proceedings, when free from fraud or manifest mistake, is not open to review by the courts.³⁸ It must not be understood, however, that any

³⁶ *State v. Board of Public Works*, 27 Minn. 442; *State v. District Court*, 29 Minn. 62, 11 N. W. 133; *Spencer v. Merchant*, 100 N. Y. 585; *Michener v. Philadelphia*, 118 Pa. St. 535. The findings of commissioners will not be disturbed by courts save for manifest error. *In re Amberson Ave.*, 179 Pa. St. 634, 36 Atl. Rep. 354.

³⁷ *Powers v. City of Grand Rapids*, 98 Mich. 393, 57 N. W. 250. As to the effect of fraud in the determination to pave a street, see *Dewey v. Des Moines*, 101 Ia., 416, 70 N. W. 605.

³⁸ *Dewey v. Des Moines*, *supra*, and cases cited.

assessment or apportionment which the legislature or commissioners may make will be permitted to stand by the court. The proceedings must comply strictly with the requirements of the statute. The improvement must be of a public nature, and the benefit accruing must result specially to the property upon which the assessment is made. A work of general benefit cannot be treated as a special benefit and the costs assessed upon certain property.³⁹

§ 105. **The frontage rule.**—The apportionment of benefits according to what is known as the frontage rule is very common. Under it the line of frontage is taken as the most practical test of probable benefits. When applied to city property it is probably as equitable as any other system that can be adopted. As said by a recent writer: "The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon the lot-owner an unjust portion of the burden."⁴⁰ The right to apportion assessments according to this rule is no longer open to controversy.⁴¹ It seems, however,

³⁹ *Baltimore v. Hughes*, 1 Gill & J. 480. See *Thomas v. Gain*, 35 Mich. 155; *Seely v. Pittsburgh*, 82 Pa. St. 360, 22 Am. Rep. 760; *In re Wash. Ave.*, 69 Pa. St. 352; *Title Guarantee & T. Co. v. Chicago*, 162 Ill. 505. See the statement of the rule and its exception in *Raleigh v. Peace*, 110 N. C. 32.

⁴⁰ Elliott, *Roads and Streets*, § 396.

⁴¹ *Sheley v. Detroit*, 45 Mich. 431; *Palmyra v. Morton*, 25 Mo. 594; *Rutherford v. Hamilton*, 97 Mo. 543; *Farrar v. St. Louis*, 80 Mo. 379; *Galesburg v. Searles*, 114 Ill. 217; *White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255, 38 Am. Rep. 143; *Springfield v. Green*, 120 Ill. 269; *Springfield v. Sale*, 127 Ill. 359; *O'Reilly v. Kingston*, 114 N.

Y. 439; *People v. Desmond*, 186 N. Y. 232; *Bacon v. Savannah*, 86 Ga. 301; *Whiting v. Townsend*, 57 Cal. 515; *Palmer v. Stumph*, 29 Ind. 329; *Parker v. Challiss*, 9 Kan. 155; modified by combining valuation and frontage in *Newman v. Emporia*, 41 Kan. 583; *Ludlow v. Cincinnati S. R. Co.*, 78 Ky. 357; *State v. Gardner*, 34 N. J. L. 327; *Corry v. Foltz*, 29 Ohio St. 320; *Magee v. Com.*, 46 Pa. St. 358; *Beaumont v. Wilkesbarre*, 142 Pa. St. 198; *Davis v. Lynchburg*, 84 Va. 861; *State v. Reis*, 38 Minn. 371; *State v. Norton*, 63 Minn. 497; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, and note, where these and many other cases are cited. The contrary was held in *McBean v. Chandler*, 9 Helsk. (Tenn.) 349;

that it is not applicable to farm lands or suburban property. With reference to such an assessment the supreme court of Pennsylvania says that it is "unequal, unjust and unconstitutional."⁴² But the entire cost of the improvement in front of a lot cannot be levied upon that lot. Such a proceeding violates every principle of equality and apportionment.⁴³

§ 106. Property exempt from taxation.—Although local assessments are made by virtue of the taxing power they are not taxes within the meaning of the word as used in statutes exempting certain property from taxation.⁴⁴ Express words are necessary to exempt from general taxation or special assessment.⁴⁵ In the following cases the language used was held not to include assessments for local improvements: Taxation of

Peay v. Little Rock, 32 Ark. 31, following *Chicago v. Larned*, 34 Ill. 253. The latter case was overruled by the decisions cited in the preceding note. Railroad property may be taxed on the basis of frontage for sewer and water connection improvements. *Palmer v. Danville*, 166 Ill. 42, 46 N. E. 629.

⁴² *Philadelphia v. Rule*, 93 Pa. St. 15; *Seely v. Pittsburgh*, 82 Pa. St. 360, 22 Am. Rep. 760; *McKeesport v. Soles*, 178 Pa. St. 363, 35 Atl. 927. In *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327, the system of local assessments is held not to apply to rural lands when it is sought to levy the cost of expensive street improvements upon them. Under certain conditions, however, farm lands may be subjected to an assessment. Thus, although the laying of water supply pipes in a street on which a farm abuts may not benefit the farm in its present condition, it is subject to assessment for benefits if the value is thereby increased for any use for which the land is adapted. *Clark v. Chicago*, 166 Ill. 84, 46 N. E.

730, distinguishing *Hutt v. Chicago*, 182 Ill. 352, and *Edwards v. Chicago*, 140 Ill. 440.

⁴³ *Motz v. Detroit*, 18 Mich. 495; *Morrison v. St. Paul*, 5 Minn. 108; *Weller v. St. Paul*, 5 Minn. 95; *State v. Jersey City*, 37 N. J. L. 128; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, note. See *Weeks v. Milwaukee*, 10 Wis. 258; *Warren v. Henly*, 31 Iowa, 31.

⁴⁴ *Ford v. Delta, etc. Co.*, 164 U. S. 662, 41 L. ed. 590; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63; *In re Mayor of New York*, 11 John. 77; *Baltimore v. Cemetery Co.*, 7 Md. 517; *Bridgeport v. Railway Co.*, 36 Conn. 255; *Chicago v. Baptist Theo. Union*, 115 Ill. 245; *Atlanta v. First Presb. Church*, 86 Ga. 730, 12 L. R. A. 852, and cases in note; *Barber Asphalt Pav. Co. v. St. Joseph*, 183 Mo. 451, 82 S. W. 64; *Broad St. Ch's App.*, 165 Pa. St. 475, 30 Atl. 1007; *Phila. v. Burial Ground Society*, 178 Pa. St. 533, 36 Atl. 172, 36 L. R. A. 263.

⁴⁵ *Lima v. Cemetery Ass'n*, 42 Ohio St. 128.

every kind,⁴⁶ taxes of every kind,⁴⁷ all taxation,⁴⁸ all taxation, either by state, parish or city,⁴⁹ all public taxes, rates and assessments,⁵⁰ all and every county road, city and school tax,⁵¹ exempt from taxation of every description,⁵² taxes, charges and impositions,⁵³ taxes and impositions,⁵⁴ any tax or public imposition whatever,⁵⁵ a tax on franchises in lieu of all other taxes,⁵⁶ exempt from taxation,⁵⁷ exempt from all taxation by state or local laws for any purpose whatever.⁵⁸ Land owned by a railroad company and held in anticipation of being needed for railroad purposes at an indefinite future time is not exempt from assessments for street improvements under a statute providing for the payment of a percentage of the gross earnings in lieu of other taxes and assessments.⁵⁹ An assessment is not invalidated by exempting certain property belonging to the state.⁶⁰

§ 107. Collection of assessments.—Special assessments must be collected in the way provided in the statute. It is generally provided that the contractor who does the work shall look to the assessment on the lot for his compensation. It is sometimes provided that the contractor shall make the collection; and in such case there is no liability on the part of the city. When, however, it is provided that the city shall make the collection

⁴⁶ *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412.

⁴⁷ *Ill. Cent. Ry. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613.

⁴⁸ *Winona & St. P. Ry. Co. v. Watertown*, 1 S. Dak. 46, 44 N. W. 1072.

⁴⁹ *La Fayette v. Male Orphans' Asylum*, 4 La. Ann. 1.

⁵⁰ *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506.

⁵¹ *Northern Liberties v. St. John's Church*, 13 Pa. St. 104.

⁵² *Illinois & M. Canal v. Chicago*, 12 Ill. 403.

⁵³ *Paterson v. Society*, 24 N. J. L. 385.

⁵⁴ *State v. Newark*, 27 N. J. L. 185.

⁵⁵ *Baltimore v. Proprietors*, 7 Md. 517.

⁵⁶ *Bridgeport v. N. Y. & N. H. Ry. Co.*, 36 Conn. 255, 4 Am. Rep. 63.

⁵⁷ *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181, 17 Am. Rep. 153; *Roosevelt Hospital v. New York*, 84 N. Y. 108.

⁵⁸ *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668. The cases with reference to church property are collected in note to *Atlanta v. First Presb. Church*, 86 Ga. 730, 12 L. R. A. 852.

⁵⁹ *State v. District Ct. of Ramsey Co.*, 68 Minn. 242, 71 N. W. 27.

⁶⁰ *Doyle v. Austin*, 47 Cal. 353; *Worcester Co. v. Worcester*, 116 Mass. 193. The cases are reviewed in *Atlanta v. First Presb. Church*, *supra*.

it acts as a representative of the contractor, and is not liable to him unless its officers fail in their duty and thus prejudice the rights of the contractor.⁶¹ Thus, when it is provided that the contractor shall perform the work and furnish the materials required under his contract according to the plans and specifications, and be entitled to his pay when the fund for that purpose shall be assessed, levied and collected by the regular agencies of the city, he has a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. If the city neglects to perform its duty he may recover such damages from it as he suffers by reason of such neglect.⁶² So a city is liable to a contractor for damages occasioned to him by reason of its mistake in the construction of the law, as where the ordinance under which the assessment was made was held void, and some of the claims for benefits were outlawed before a re-assessment could be made.⁶³ When the proper authorities have accepted the work as satisfactory it is conclusive, and the property owner cannot defend against the assessment by showing that the work is not properly performed. "No misconstruction or malconstruction of the work arising from the incapacity, the honest mistake or the fraud of the contractor would invalidate the assessment or relieve the parties assessed from the obligation to pay it. In this respect the property owners assessed under the provisions of the law for the cost of a sewer must stand upon the same footing with parties assessed for taxes for the public benefit. They take the hazard incident to all public improvements of their being faulty or useless through the incapacity or fraud of public servants."⁶⁴ The amount of the assessment should be made a lien upon the land benefited and a method provided for its sale.⁶⁵

§ 108. Personal liability for assessments.—The English statutes make local assessments a charge upon the land and also

⁶¹ *Chambers v. Satterlee*, 40 Cal. N. Y. 30, 19 N. E. 508.

497; *Lovell v. St. Paul*, 10 Minn. 290. If the city agrees to collect the assessment and fails to make a reasonable attempt to do so it is liable to the contractor. *Morgan v. Dubuque*, 28 Iowa, 575.

⁶² *Reilly v. City of Albany*, 112

⁶³ *Denny v. City of Spokane*, 25 C. C. A. 164, 79 Fed. 719.

⁶⁴ *State v. Jersey City*, 29 N. J. Law, 441; *Cooley, Taxation*, 671.

⁶⁵ *McInerny v. Reed*, 23 Iowa, 410. See *Morrison v. Hershire*, 32 Iowa, 271.

authorize a personal action against "the present and future owner of the property."⁶⁶ In many states such a liability has been imposed and been unquestioned,⁶⁷ while in others it has been sustained after full consideration.⁶⁸ But most of the latest cases support the view that no personal judgment can be entered against the owner of the land benefited. The reason for this rule is thus stated by the supreme court of California:⁶⁹ "To say that the owner of land bordering upon an improved street can be made personally liable for the payment of the improvement is equivalent to saying that his entire estate, real, personal, and mixed, whether bordering upon the street or remote from it, whether within the corporate limits or without, whether benefited or not, shall be held responsible for the tax, which, in turn, is equivalent to saying that his entire estate may be taxed for the improvement, in direct contradiction to the very terms of the power." In some states a personal judgment not to exceed the value of the property is allowed,⁷⁰ while in others the liability is limited to the amount of the fund realized from the sale of the land.⁷¹ Under the prevailing rule the only judgment allowable is for the enforcement of the lien upon the land in the exact manner specified by the law.⁷²

⁶⁶ *Bermondsey v. Ramsey*, L. R. 6 C. P. 247.

⁶⁷ *Emery v. Bradford*, 29 Cal. 75, and cases cited in note to *Ivanhoe v. Enterprise*, 29 Oreg. 245, 35 L. R. A. 60.

⁶⁸ *Dewey v. Des Moines*, 101 Ia., 416, 70 N. W. 805; *Farwell v. Manufacturing Co.*, 97 Ia. 286, 66 N. W. 176.

⁶⁹ *Taylor v. Palmer*, 31 Cal. 240. To the same effect are *Dempster v. People*, 158 Ill. 36; *Ill. Cent. R. R. Co. v. People*, 161 Ill. 244; *Shepherd v. Sullivan*, 166 Ill. 78, 46 N. E. Rep. 720; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330; *Ivanhoe v. Enterprise*, 29 Oreg. 245, 35 L. R. A. 58, and note. *Neenan v. Smith*, 50 Mo. 525; *Shaw v. Peckett*, 26 Vt. 482; *St. Louis v. Allen*, 53 Mo. 44. In *Craw v. Tolono*, 96 Ill. 255, 35 Am. Rep. 143, the court said: "A man who owns real estate

within a state or municipality necessarily subjects that property to the lawful rules and regulations of the state or municipality; but he does not thereby subject the rest of his fortune not within such state or municipality to the jurisdiction of such municipality, unless he is a citizen or resident of such state or municipality or transacts business therein." See *Noonan v. Stillwater*, 33 Minn. 198.

⁷⁰ See *Broadway Church v. McAttee*, 8 Bush (Ky.) 508, 8 Am. Rep. 480.

⁷¹ *Moale v. Baltimore*, 61 Md. 224.

⁷² *Pleasant Hill v. Dasher*, 120 Mo. 675; *Clinton v. Henry Co.*, 115 Mo. 557. The right to a personal judgment under a statute giving power to collect assessments "in the same manner as other taxes are collected" is doubted in *McCrowell v. Bristol*, 89 Va. 652, 20 L. R. A. 653.

CHAPTER XII.

THE MANNER OF EXERCISING CORPORATE POWER.

- § 109. Charter provisions.
- 110. Meaning of terms.
- 111. Statutory directions.

- § 112. Procedure in the enactment of ordinances.
- 113. Where no mode is prescribed.
- 114. Illustrations.

§ 109. Charter provisions.—The charter ordinarily provides for the various methods by which the corporation shall exercise the powers conferred upon it. Certain powers may be exercised through designated boards or officials without reference to the city council. But as a general rule, all powers, whether police or contractual, are exercised through the body in which is vested the legislative function.¹ The formal expression of the will of this body is evidenced by an ordinance or resolution.²

§ 110. Meaning of terms.—The words “ordinance” and “by-law” are practically synonymous,³ although in the United States the word “by-law” is used more often in connection with private corporations.⁴ An ordinance is “a local law prescribing a general and permanent rule,”⁵ while a resolution is of a special or temporary character and is ordinarily enacted with less formality.⁶ Comparing the different terms, Chief Justice Lowrie

¹ *Terre Haute v. Lake*, 43 Ind. 480; *Saxton v. St. Joseph*, 60 Mo. 153.

² *Dey v. Jersey City*, 19 N. J. Eq. 412; *Creighton v. Manson*, 27 Cal. 613; *Alton v. Mulledy*, 21 Ill. 76. It must be by a vote embodied in some distinct and definite form. *Schumma v. Seymour*, 24 N. J. Eq. 143.

³ *Bills v. Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; *National Bank of Commerce v. Grenada*, 44 Fed. 262.

⁴ *Kepner v. Commonwealth*, 40 Pa. St. 124; *Taylor v. Lambertville*, 43 N. J. Eq. 107. An ordinance is

“the law of the inhabitants of the corporate place or district made by themselves, or the authorized body, in distinction from the general law of the country or the statute law of the particular state.” 1 *Dillon, Mun. Corp.*, § 307; *Willcox, Corp.* 73; 2 *Kyd, Corp.* 95, 98; *Commonwealth v. Turner*, 1 *Cush. (Mass.)* 493.

⁵ *Citizens' Gas & Mining Co. v. Elwood*, 114 Ind. 332.

⁶ *Blanchard v. Bissell*, 11 Ohio St. 96; *State v. Bayonne*, 35 N. J. L. 335; *Kepner v. Commonwealth*, 40 Pa. St. 124.

said:⁷ “ ‘Regulation’ is the most general of them all, meaning any rule for the ordering of affairs public or private; and it thus becomes the generic term from which all the others are defined, specified and differentiated. ‘Ordinance’ is the next most general term, including all forms of regulation by civil authority, even acts of parliament. With us its meaning is usually confined to corporation regulations. Ordinances are all sorts of rules and by-laws of municipal corporations. ‘Resolution’ is only a less solemn or less usual form of an ordinance. It is an ordinance still if there is anything intended to regulate the affairs of a corporation.”

§ 111. Statutory directions.—Where a power is conferred by statute and the manner of its exercise is prescribed, all other modes are impliedly prohibited.⁸ Such directions must be strictly and literally complied with, as they are in effect limitations upon the grant.⁹

§ 112. Procedure in the enactment of ordinances.—Statutory directions as to the procedure to be observed in the enactment of ordinances are mandatory, and if not complied with the ordinance is void.¹⁰ But if the mode of procedure is left to the

⁷ *Kepner v. Commonwealth*, 40 Pa. St. 124, at 130; *Comm. v. Turner*, 1 Cush. 493.

⁸ *Des Moines v. Gilchrist*, 67 Iowa, 210; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

⁹ *State v. Newark*, 25 N. J. L. 399; *Iowa Land Co. v. County of Sac*, 39 Iowa, 124, at 149; *Mayor v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Ferguson v. Halsell*, 47 Tex. 421; *Sadler v. Eureka Co.*, 15 Nev. 39; *Glass Co. v. Ashbury*, 49 Cal. 571; *McCoy v. Briant*, 53 Cal. 247. In *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, Field, C. J., said: “When the mode in which their power on any given subject can be exercised is prescribed by their charter the mode must be followed. The mode in such cases constitutes the measure of the power.” An ordinance is not invalidated by

the failure of the clerk to comply with a statute requiring him to place his certificate in the journal of the proceedings and on the ordinance, when all other requirements are complied with. *Boehme v. Monroe*, 106 Mich. 401, 64 N. E. 204.

¹⁰ *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69; *Altoona v. Bowman*, 171 Pa. St. 307; *Bloom v. Xenia*, 32 Ohio St. 461; *Welker v. Potter*, 18 Ohio St. 85; *Blanchard v. Bissell*, 11 Ohio St. 101; *Cantril v. Sainer*, 59 Iowa, 26; *Herzo v. San Francisco*, 33 Cal. 134; *Smith v. Emporia*, 27 Kan. 528; *State v. Newark*, 25 N. J. L. 399; *Danville v. Shelton*, 76 Va. 325. As to requirement of a majority vote, see *Ill. T. & Sav. Bank v. Arkansas City*, 76 Fed. Rep. 271, 34 L. R. A. 518. If in the charter it is required

municipal body it may be determined by an ordinance, and the mode so provided must be observed in the enactment of all ordinances.¹¹ There seems to be a tendency toward allowing municipalities to provide their own rules of procedure.¹²

§ 113. Where no mode is prescribed.—When a power exists and the manner of exercising it is not declared, the council may proceed either by way of ordinance or resolution.¹³ As a general rule, however, it may be said that all general and permanent acts should be in the form of ordinances,¹⁴ while ministerial acts may be by resolution.¹⁵ The difference is not so much in the nature of the act as in the manner of enactment. Both are legislative acts; and when it appears that a resolution was passed with all the formalities required for an ordinance, it is generally held valid as an ordinance.¹⁶ Where a contract which

that there shall be a publication of an ordinance between the second and third reading, such publication may be shown *altunde* the records of the council. *State v. New Brunswick*, 58 N. J. L. 255.

¹¹ *Swindell v. State*, 143 Ind. 153.

¹² See *Swift v. People*, 162 Ill. 534, 33 L. R. A. 470.

¹³ *Crawfordsville v. Braden*, 180 Ind. 149, 30 Am. St. Rep. 214, 14 L. R. A. 268; *Butler v. Passaic*, 44 N. J. L. 171; *State v. Jersey City*, 27 N. J. L. 493; *Green v. Cape May*, 41 N. J. L. 45, 46; *Burlington v. Dennison*, 42 N. J. L. 165; *Quincy v. Chicago, etc. R. Co.*, 92 Ill. 21; *Indianapolis v. Imberry*, 17 Ind. 175; *First Municipality v. Cutting*, 4 La. Ann. 335; *Halsey v. Rapid Tr. Co.*, 47 N. J. Eq. 380, 20 Atl. 859. See note to *Robinson v. Franklin*, 1 Humph. 156, in 34 Am. Dec. 625; *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543.

¹⁴ A common council should act by ordinance in organizing a fire department, in promoting a plan of government for it, or in prescribing the manner of the election of its

officers and their duties. But it may act by resolution in purchasing the fire-engine. *Green v. Cape May*, 41 N. J. L. 45. See the following cases, which, however, are controlled by statute: *City of Paterson v. Barnet*, 46 N. J. L. 62; *Grimmell v. Des Moines*, 57 Iowa, 144.

¹⁵ *Sower v. Philadelphia*, 35 Pa. St. 231; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190.

¹⁶ *Shenck v. Borough*, 181 Pa. St. 191; *Tipton v. Norman*, 72 Mo. 380; *Rumsey Mfg. Co. v. Schell City*, 21 Mo. App. 175; *Gas Co. v. San Francisco*, 6 Cal. 190; *Sower v. Philadelphia*, 35 Pa. St. 231; *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508, at 539; *Municipality v. Cutting*, 4 La. Ann. 335. In *City of Delphi v. Evans*, 36 Ind. 90, the court said: "We do not regard the name or form of the order as of the substance of the thing. It may be done by an ordinance, by a motion, or resolution; but whatever mode may be adopted, it must comply with the requirements of the charter." A resolution, to have the effect of a law, must be passed with

the municipality is authorized to enter into is not required to be made in the form of an ordinance, it may be by resolution.¹⁷ But an act which the charter specifically requires to be done by ordinance cannot legally be done by resolution,¹⁸ although one that is authorized to be done by resolution may be done by ordinance.¹⁹

§ 114. Illustrations.—An ordinance has been held necessary to authorize the grading of a street,²⁰ to change the width of a sidewalk,²¹ to appoint a commission to assess damages resulting from the widening of a street,²² to fix the compensation of officers,²³ to provide for the payment of license fees,²⁴ to authorize the specific improvement of city property under a general power to pass all proper and necessary laws providing for improvements,²⁵ or to authorize the use of a street or alley.²⁶

On the other hand, the council may by resolution authorize the construction of a sewer,²⁷ remove the clerk of the corporation,²⁸ authorize the opening of a new street,²⁹ the purchase of fire apparatus,³⁰ the acceptance of a dedication,³¹ the improvement of

all the formalities required in the enactment of a law. Thus, money cannot be appropriated by a joint resolution when the constitution requires that no money can be drawn except in pursuance of appropriations made by law. *May v. Rice*, 91 Ind. 546; *Burritt v. Commissioners of State Contracts*, 120 Ill. 322.

¹⁷ *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271.

¹⁸ *Cape Girardeau v. Fougén*, 30 Mo. App. 551. A resolution is not the legal equivalent of an ordinance. *City of Paterson v. Barnet*, 46 N. J. L. 62.

¹⁹ *Los Angeles v. Waldron*, 65 Cal. 283.

²⁰ *State v. Bayonne*, 35 N. J. L. 335.

²¹ *Cross v. Mayor of Morristown*, 18 N. J. Eq. 305, decided under a statute granting to the common

council the power to pass ordinances to regulate the sidewalks and streets.

²² *State v. Bergen*, 33 N. J. L. 72.

²³ *Central v. Sears*, 2 Colo. 588; *Smith v. Com.*, 41 Pa. St. 335.

²⁴ See *People v. Crotty*, 93 Ill. 180.

²⁵ *Zottman v. San Francisco*, 20 Cal. 96.

²⁶ *Indianapolis v. Miller*, 27 Ind. 394.

²⁷ *State v. Jersey City*, 27 N. J. L. 493.

²⁸ *Landow West v. Burtram*, 26 Ont. Rep. 161.

²⁹ *Sower v. Philadelphia*, 35 Pa. St. 231.

³⁰ *Green v. Cape May*, 41 N. J. L. 45.

³¹ *State v. Elizabeth*, 37 N. J. L. 432.

a street,³² the laying of a tax for a specific purpose,³³ or empower the mayor to appoint a commission of architects to report upon the safety of a building.³⁴ So, when an ordinance requires a license and authorizes the council to fix the license fee as it shall from time to time think proper, the fee may be fixed by resolution.³⁵ No rules of any particular value can be laid down on this subject, as each case must be determined after a careful examination of the charter under which the council is acting.

³² *Indianapolis v. Imberry*, 17 Ind. 175, where the court said: "The manner in which the order or determination of the council that a given street or alley, or part thereof, shall be improved, is to be expressed, is not pointed out in the paramount law."

³³ It is an act of "a temporary

character and prescribes no permanent rule of government." *Blanchard v. Bissell*, 11 Ohio St. 103.

³⁴ *Egan v. Chicago*, 5 Ill. App. 70.

³⁵ *City of Burlington v. Putnam Ins. Co.*, 31 Iowa, 102; *Arkadelphia Lumber Co. v. City of Arkadelphia*, 56 Ark. 370, 19 S. W. 1053. See *People v. Crotty*, 93 Ill. 180.

CHAPTER XIII.

THE FORM AND ENACTMENT OF ORDINANCES.

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| <p>§ 115. The form.
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§ 115. **The form.**—An ordinance should properly take the form of a statute, although this is not essential to its validity, as it is sufficient if it contains the substance of an ordinance and is properly enacted.¹ There should be a title, an enacting clause, a repealing clause, and a provision fixing the time when the ordinance will take effect. Certain requirements as to form are commonly found in charters and statutes.

§ 116. **The title.**—It is generally provided that the ordinance shall relate to but one subject, which shall be expressed in the title. Such provisions, like those found in constitutions relating to statutes, are intended to guard against fraud and surprise and are governed by the same rules of construction.² Constitutional provisions with reference to the title of a statute do not

¹ Rumsey Mfg. Co. v. Schell City, 21 Mo. App. 175.

² Esling's Appeal, 89 Pa. St. 205; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; Bergman v. St. Louis, etc. R. Co., 88 Mo. 678; Stebbins v. Mayer, 38 Kan. 573, 16 Pac.

745. Such provisions are mandatory. Missouri Pac. R. Co. v. City of Wyandotte, 44 Kan. 32, 23 Pac. 950. The construction of the ordinance cannot be controlled by the title. State v. Beverly, 45 N. J. L. 288.

apply to municipal ordinances unless expressly made applicable thereto.³

§ 117. The enacting clause.—An ordinance should show on its face that it was passed by a body having authority to pass it.⁴ Properly there should be an enacting clause, as “Be it enacted by the Common Council of ——.” But the absence of such clause is not fatal, even when required by the charter, as the record of the passage of the ordinance is a sufficient declaration that it is the act of the council.⁵

§ 118. Penalty.—A criminal ordinance must contain provisions for a definite penalty, as this cannot be left to the discretion of the court.⁶ This penalty must be reasonable in amount in view of the nature of the offense.⁷ It is sufficiently definite if it fixes the maximum amount of the penalty, as “it is in harmony with our system of jurisprudence to allow the court or

³ *In re Haskell*, 112 Cal. 412, 32 L. R. A. 527; *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. 678; *People v. Wagner*, 86 Mich. 594, 24 Am. St. 141; *People v. Hanrahan*, 75 Mich. 611, 4 L. R. A. 751. See *re Thomas*, 53 Kan. 659, 37 Pac. 171.

⁴ *Hawkins v. Huron*, 2 U. C. C. P. 72.

⁵ *People v. Murray*, 57 Mich. 396, 24 N. W. 118. A charter provision requiring that an ordinance shall contain an enacting clause is, in the absence of terms expressing a contrary intention, directory only, and will not invalidate an ordinance which merely omits the clause. *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. 678; *St. Louis v. Foster*, 52 Mo. 513. *Contra*, *Galveston, etc. R. Co. v. Harris* (Tex. Civ. App.), 36 S. W. 776. The omission of the name of the town from the enacting clause will not invalidate the ordinance if it appears from the title that it was an ordinance of the particular town and is shown that it was regularly passed and in other

respects conforms to the statutory requirements. *State v. Fountain*, 14 Wash. 236, 44 Pac. 270. The authorities on the question of the effect of the omission of an enacting clause from a statute are conflicting. In *State v. Patterson*, 98 N. C. 660; *State v. Rogers*, 10 Nev. 250; *Burritt v. Commissioners*, 120 Ill. 322, and *May v. Rice*, 91 Ind. 546, it is held that the constitutional requirement of an enacting clause is mandatory. *McPherson v. Leonard*, 29 Md. 377, and *Cape Girardeau v. Riley*, 52 Mo. 424, hold such a provision directory only. See, also, *Watson v. Corey*, 6 Utah, 150, and *Hill v. Boyland*, 40 Miss. 618.

⁶ *State v. Worth*, 95 N. C. 615; *Bowman v. St. John*, 43 Ill. 337; *Melick v. Washington*, 47 N. J. L. 254; *State v. Ziegler*, 32 N. J. L. 262; *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. R. 310.

⁷ *In re Frazee*, 63 Mich. 396; *Mobile v. Yuille*, 3 Ala. 137; *re Ah You*, 88 Cal. 99, 25 Pac. 974, 22 Am. St. 280, 11 L. R. A. 408.

jury trying the cause to fix the penalty within the bound prescribed, with the right to vary in amount according to the gravity of the offense."⁸ It has been held that the precise penalty for the infraction of a police ordinance must be provided for in the ordinance, and that an ordinance which provides that a justice of the peace may impose a penalty between two specified limits is invalid.⁹ It is sometimes provided that conviction for the violation of an ordinance shall work a forfeiture of a license. It has been recently held that a city cannot enact such an ordinance, because it would operate as an extinguishment of a right which can only be legally extinguished by the city council. Thus, an ordinance which provided that a conviction of a violation of its provisions should operate as a revocation of a liquor license was held to be an unauthorized delegation of authority to revoke a license, which by the charter was conferred exclusively upon the city council.¹⁰ But such an ordinance was sustained in Minnesota without reference to this objection. It was there held that the provision for the revocation of the license was not a part of the penalty, and did not change the grade of the offense. It was held that the granting of the license was a mere privilege, and that the provision in the charter that conviction of the licensee for a violation of the liquor ordinance should work a revocation was valid. The court said:¹¹ "While the revocation by the court follows conviction as a consequence of the violation of the ordinance, it has no more the purpose or effect of punishment than if the license were revoked by the mayor or city council, neither of whom would have the power to impose punishment for the offense. There is a plain distinction between such a withdrawal of a special privilege which has been abused, the termination of a mere license, and the penalty which the law imposes as a *punishment* for crime. The constitutional provision limiting the jurisdiction of justices of the peace by the measure of the 'punishment' which may be imposed has no reference to any such incidental consequences."¹²

⁸ *Bills v. Goshen*, 117 Ind. 221, 8 L. R. A. 261. And see *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158.

⁹ *State v. Ocean Grove Camp Meeting Ass'n*, 59 N. J. L. 110, 85 Atl. 794.

¹⁰ *State v. Rahway*, 58 N. J. L. 578.

¹¹ *State v. Harris*, 50 Minn. 128.

¹² *State v. Larson*, 40 Minn. 68,

41 N. W. 368.

§ 119. Need not recite authority.—An ordinance need not recite the authority under which it is enacted.¹³ Nor need it recite the fact of compliance with conditions precedent to the right to enact the ordinance.¹⁴ Where the authority is to pass an ordinance if found necessary the ordinance need not recite the necessity,¹⁵ unless the charter requires it to be so stated.¹⁶

§ 120. Council meeting.—A valid ordinance can only be enacted at a legally convened meeting of a properly constituted council or legislative body vested with authority to pass the same and acting in accordance with statutory formalities.¹⁷

§ 121. Introduction—Notice.—Where the charter provides that an ordinance must be introduced at a previous meeting it cannot be materially amended and passed at the subsequent meeting; the amendment must have been previously introduced.¹⁸ Nor under such provision can an ordinance be passed at an adjourned meeting.¹⁹

¹³ *Methodist P. Church v. Baltimore*, 6 Gill, 391, per Dorsey, C. J.; *Com. v. Fahey*, 5 Cush. 408.

¹⁴ *Cronin v. People*, 82 N. Y. 318; *Coates v. New York*, 7 Cow. 585; *Rex v. Harrison*, 3 Burr. 1322, at 1328.

¹⁵ *Coates v. Mayor*, 7 Cow. (N. Y.) 585; *Young v. St. Louis*, 47 Mo. 492; *Kiley v. Forsee*, 57 Mo. 390.

¹⁶ *Hoyt v. East Saginaw*, 19 Mich. 39.

¹⁷ *County of San Luis Obispo v. Hendricks*, 71 Cal. 242; *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69. The rules of parliamentary law need not be observed unless required by the charter. (Legislature.) *McDonald v. State*, 80 Wis. 411; *McGraw v. Whitson*, 69 Iowa, 348, 28 N. W. 632; (legislature) *St. Louis, etc. Co. v. Gill*, 54 Ark. 101, 11 L. R. A. 452.

¹⁸ *State v. Bergen*, 33 N. J. L. 89. In *State v. Jersey City*, 34 N. J. L. 429, the court said: "The object of

the provision requiring such previous introduction would be wholly frustrated if an ordinance could be so materially amended and passed at the same meeting, and its sanction might in all cases be evaded under the guise of an amendment." See *State v. City of Hudson*, 29 N. J. L. 475. For effect of an indefinite postponement, see *Zeller v. Central R. Co.*, 84 Md. 304, 34 L. R. A. 469.

¹⁹ "An adjourned meeting is a continuation of the same meeting, and at such adjourned meeting the council may do any act which might have been done if no adjournment had taken place. The meeting of May 2d, at which the ordinance was introduced, was not a meeting previous to that of May 9th, at which it was passed, but a continuation of the same meeting; and as the ordinance could not have been passed on May 2d, neither could it be passed on May 9th." *Staates v. Washington*, 44 N. J. L. 605.

§ 122. Readings.—A provision requiring every ordinance to be read at three different meetings before its final passage is mandatory.²⁰ A reading by the title for at least one of the three readings is a sufficient compliance with such a requirement.²¹ A newly-constituted council may take up an ordinance which was read twice in the preceding council, give it a third reading and pass it.²² A reading may be at a special or adjourned meeting.²³ Where a charter requires an ordinance to be published for a certain time and in a certain manner between its second and third readings, it cannot lawfully be amended in any material respect and read again without the notice required by the charter.²⁴ An ordinance which requires that all ordinances shall be read three times before being passed and that no ordinance shall be read the third time and passed on the same day on which it was introduced, unless the rule be suspended by a two-thirds vote, cannot be repealed by a mere majority vote.²⁵

§ 123. Suspension of the rules.—All provisions regulating the passage of an ordinance under a suspension of the rules must be strictly observed. When the rules are so suspended but one ordinance can be passed under such suspension.²⁶

§ 124. Presumption as to regularity.—All meetings of the council are presumed to be regularly conducted. Thus, where it is the duty of the mayor to preside at a council meeting, it will be presumed that he was present and presided.²⁷

§ 125. Signing.—The signing of an ordinance by a clerk of the council is a ministerial act, and if he refuses to comply with the requirement the presiding officer may appoint a deputy to sign the same.²⁸ Nor is the signature of the mayor generally

²⁰ *Weill v. Kenfield*, 54 Cal. 111. But see *Barton v. Pittsburgh*, 4 Brew. (Pa.) 373. The two-thirds of the members required to dispense with a regular reading means two-thirds of the members voting if they are not less than a majority which constitutes a quorum. *Zeller v. Central R. Co.*, 84 Md. 304, 34 L. R. A. 469.

²¹ *State v. Camden*, 58 N. J. L. 515, 33 Atl. 846.

²² *McGraw v. Whitson*, 69 Iowa, 348.

²³ *Cutcomp v. Utt*, 60 Iowa, 156, 14 N. W. 214.

²⁴ *State v. Newark*, 30 N. J. L. 303.

²⁵ *Swindell v. State*, 143 Ind. 153, 42 N. E. 528.

²⁶ *Bloom v. Xenia*, 32 Ohio St. 46; *So. Jersey Tel. Co. v. Woodbury*, 73 N. J. L. 276, 63 Atl. 4.

²⁷ *Martin v. State*, 23 Neb. 371, 36 N. W. 554, Maxwell, J., dissenting.

²⁸ *Preston v. Manvers*, 21 U. C. Q. B. 626.

necessary to the validity of an ordinance which has been regularly passed and recorded.²⁹ But a statute may, by its express terms, make the mayor's signature essential to the validity of the ordinance. But a requirement that the mayor shall authenticate all ordinances by his signature is merely directory.³⁰ A direction in a city charter that a bill shall be signed in open session is mandatory.³¹ Under a statute providing that "no bill shall become a law until the same is signed by the president of the board of aldermen and the mayor," and that "the mayor shall preside at all meetings of the board of aldermen," a signing by the mayor as such only, is sufficient.³² When an ordinance is required to be signed by the presiding officer and attested by the clerk, the defect cannot be remedied by motion.³³

§ 126. Approval.—The requirement of the executive approval must be distinguished from that of signing. Such approval is generally made essential to the validity of an ordinance, and when such is the case all proceedings under an ordinance which has neither been approved nor passed over a veto are void.³⁴ "Whenever, either by constitutional or legislative requirement, the president of the United States, the governor of a state or the mayor of a city is required to approve an act of Congress, or of a legislature, or of a court of common council, the word 'approve' means more than the unexpressed mental acquiescence of the individual in the propriety of what has been done; it means that the officer, in his official capacity as the guardian of the interests of the community, having in view its welfare, and not

²⁹ *Martindale v. Palmer*, 52 Ind. 411; *State v. Henderson*, 38 Ohio St. 644. It is sometimes expressly provided that if the mayor neglects or refuses to sign the ordinance it shall become a law without his signature. *Saleno v. Neosho*, 127 Mo. 627, 27 L. R. A. 679, 48 Am. St. 653.

³⁰ *Blanchard v. Bissell*, 11 Ohio St. 96; *Stevenson v. Bay City*, 26 Mich. 44; *Martindale v. Palmer*, 52 Ind. 411; *McKenzie v. Wooley*, 39 La. Ann. 944; *Opelousas v. Andrus*, 37 La. Ann. 699.

³¹ *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22, 18 Am. St. 530.

³² *Becker v. Washington*, 94 Mo. 375. See *Werth v. Springfield*, 78 Mo. 109.

³³ *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115.

³⁴ *People v. Schroeder*, 76 N. Y. 160; *Dey v. Jersey City*, 19 N. J. Eq. 412. Necessity of approval of order or resolution. *Shaub v. Lancaster*, 156 Pa. St. 362, 21 L. R. A. 691.

his personal wish or advantage, shall consider the proposed legislation and determine that it is proper, and make that fact known to all men with absolute certainty, by some visible, unmistakable and enduring mark, to wit, by written declaration attested by his signature.”³⁵ Where the charter provides that the approval of the mayor shall be by his signature, his approval cannot be shown in any other way.³⁶ It has been held there must be a formal and literal presentation for approval or veto, and that a requirement, therefore, cannot be waived by the mayor.³⁷ The express charter requirement that the ordinance shall be submitted to the mayor before it becomes law is mandatory.³⁸ And if the statute prescribes the manner in which the measure shall be approved, the approval in that manner cannot be dispensed with. Though the mayor puts the resolution, declares it adopted, and in fact signs and approves it, this is not in such a case sufficient.³⁹

§ 127. Approval—Illustrations.—Where the council has power to pass “by-laws, ordinances, resolutions and regulations,” and the charter requires that “by-laws and ordinances” shall be approved by the mayor, the requirement extends to resolutions.⁴⁰ But a provision requiring all ordinances and resolutions to be presented to the mayor for his approval does not apply to the appointment of officers by the council.⁴¹ It is sufficient if the ordinance be approved by the “acting president of the board of aldermen,” in the mayor’s absence, where it is provided by statute that such officer shall for the time being perform the duties of mayor, with all his rights, powers and jurisdiction.⁴²

³⁵ *New York, etc. R. Co. v. City of Waterbury*, 55 Conn. 19, per Pardee, J.

³⁶ “It is enough to say * * * that the charter provides but one mode for the mayor to attest his approval of resolutions, to wit, by his signature. It is impossible to substitute for that any other evidence that as an alderman or as a private person he approved or consented to the resolutions.” *Gilfillan*, C. J., in *State v. District Court*, 41 Minn. 518. *Contra*, *Woodruff v. Stewart*, 63 Ala. 208. The signature affixed to the journal of the council is not

a sufficient approval. *Graham v. Carondelet*, 33 Mo. 262.

³⁷ *State v. Newark*, 25 N. J. L. 399.

³⁸ *Babbidge v. Astoria*, 25 Oreg. 417, 36 Pac. 291, 42 Am. St. 796.

³⁹ *Whitney v. Port Huron*, 88 Mich. 268, 26 Am. St. 291.

⁴⁰ *Kepner v. Com.*, 40 Pa. St. 124. But see *Blanchard v. Bissell*, 11 Ohio St. 103.

⁴¹ *McDermott v. Miller*, 45 N. J. L. 251.

⁴² *Saleno v. Neosho*, 127 Mo. 627, 27 L. R. A. 769.

§ 128. The executive veto.—When an ordinance is vetoed there can be but one reconsideration; ⁴³ and where the charter provides that “at the next meeting of the council after a disapproval by the mayor it shall proceed to reconsider the resolution,” it cannot be postponed to a subsequent meeting.⁴⁴ Where an ordinance is passed over the veto it takes effect without further act of the executive.

§ 129. Necessity for publication.—It is commonly required that all ordinances shall be published before taking effect. This just and reasonable provision must be complied with in order to give validity to the law.⁴⁵ Under such a provision actual notice is not the equivalent of publication.⁴⁶ Provisions relating to publication are strictly construed when applied to police ordinances which affect the personal rights and liberties of the citizen. Under a constitutional provision that no person shall be punished save under a law established and promulgated prior to the commission of the offense, an ordinance must be published for such a time as will give the public a reasonable opportunity to become acquainted with its provisions.⁴⁷ The legislature may provide

⁴³ *Sauk v. Philadelphia*, 8 Phila. (Pa.) 117.

⁴⁴ *Peck v. Rochester*, 3 N. Y. Supp. 872.

⁴⁵ *Meyer v. Fromm*, 108 Ind. 208; *Napa v. Easterby*, 61 Cal. 509; *Waln v. Philadelphia*, 99 Pa. St. 330; *Higley v. Bunce*, 10 Conn. 436; *Schwartz v. Oshkosh*, 55 Wis. 490; *Elizabethtown v. Lefler*, 23 Ill. 90; *Stillwater v. Moor* (Oklahoma, 1893), 33 Pac. 1024. But see *Elmendorf v. Mayor*, 25 Wend. (N. Y.) 693. Publication in an extra edition of a daily paper only a few copies of which were issued was not such a publication as is contemplated by the law. *State v. Omaha & C. B. R. & B. Co.*, 113 Iowa, 30, 84 N. W. 983.

⁴⁶ *O'Hara v. Park River*, 1 N. D. 279, 47 N. W. 880; *National*

Bank of Commerce v. Grenada, 44 Fed. 262. Where an ordinance required that a resolution for improvement of a street should be published, and provided that the publication should be sufficient notice to non-resident property-owners, it was held that personal service upon a property-owner rendered publication unnecessary as to him. *Chariton v. Holliday*, 60 Iowa, 391, 14 N. W. 775.

⁴⁷ A publication for seven days is sufficient. *Pitts v. Opelika*, 79 Ala. 527. For an illustration of the effect of a requirement of publication of an administrative ordinance, see *Stuhr v. Hoboken*, 47 N. J. L. 147. It is not necessary to publish books and maps referred to in an ordinance. *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253.

that the failure to publish an ordinance within a stated time shall not affect its validity, but it can have no retroactive effect.⁴⁸

A provision in a city charter that the ayes and noes shall be called and published whenever the vote of the council is taken on any proposed improvement involving a tax or assessment upon the people is directory—"the essential requirement being the determination of the improvement and not the form or manner of expressing that determination."⁴⁹

§ 130. Publication directory.—In Massachusetts, certain statutes providing for the publication of ordinances were held to be directory. Thus, when ordinances were required to be "published two weeks successively in three newspapers published in the city," Morton, C. J., said⁵⁰ that, as there is no provision that the ordinance shall not take effect until published, "the provision requiring publication is directory; it contemplates a publication after the ordinance is enacted, and a compliance with it is not a condition precedent to the validity of the ordinance."

§ 131. Ultra vires acts of officials.—When an ordinance is passed and published in the mode prescribed by the charter, it is valid although the city officials exceeded their authority in incurring a debt for the publication.⁵¹

§ 132. Manner of publication.—When no method of publication is prescribed it seems that posting copies in public places is sufficient.⁵² But publication is generally directed to be made in a newspaper published or having a general circulation in the municipality. A statute requiring "legal notices and advertisements" to be published in newspapers of the county has no application to city ordinances.⁵³

§ 133. Designation of paper.—The designation of the paper must be by the proper authority. Thus, where a town is given discretion to publish the ordinances in either of three specified

⁴⁸ *Schweitzer v. Liberty*, 82 Mo. 309. 14 N. E. 451. See, also, *Sacramento v. Dillman*, 102 Cal. 107,

⁴⁹ *Striker v. Kelly*, 7 Hill (N. Y.) 9; *Indianola v. Jones*, 29 Iowa, 282; *St. Louis v. Foster*, 52 Mo. 513; *Elmendorf v. Mayor, etc.*, 25 Wend. 693. 36 Pac. 385. ⁵¹ *Kimble v. Peoria*, 140 Ill. 156, 29 N. E. 723. ⁵² *Queen v. Justices*, 4 Q. B. 522, 29 Moak's Eng. Rep. 61.

⁵⁰ *Com. v. Davis*, 140 Mass. 485; *Com. v. McCafferty*, 145 Mass. 384, 360, 29 Pac. 757. ⁵³ *Pittsburg v. Reynolds*, 48 Kan.

classes of papers, a publication made in a paper belonging to one of the classes by order of the town clerk is ineffectual.⁵⁴ But where the council neglects to designate a paper and the law requires the clerk of the board of aldermen to publish resolutions and ordinances of the kind in question, the clerk may make a legal publication in any paper published in the city.⁵⁵

§ 134. Location of paper—"Printed and published in the city."—A paper is printed and published in the city if it is there composed, set up, and placed in forms, although the press-work is done elsewhere.⁵⁶ A statute which requires publication in a newspaper of the town for a specified period is complied with by publication in a paper prepared and edited expressly for publication in the town and having its principal circulation there, although it is printed elsewhere and sent to the town in bundles for distribution.⁵⁷ But there can be no valid "publication" in a paper which has no circulation in a town although it is entirely printed there.⁵⁸

§ 135. Manner and sufficiency.—It is not necessary to publish along with the ordinance the law which is the authority for its enactment.⁵⁹ The publication may be in connection with the other proceedings of the council.⁶⁰ The distribution of printed copies of an ordinance along with a newspaper is a compliance with a statute requiring publication in the paper.⁶¹ Inaccuracies in printing are immaterial if the meaning is clear from the context.⁶²

§ 136. Distinction between publication and notice.—There is a manifest distinction to be observed between the publication of a notice and the publication of an instrument, a statute

⁵⁴ Higley v. Bunce, 10 Conn. 436, 567. See Chicago v. McCoy, 136 Ill. 344, 11 L. R. A. 413.

⁵⁵ *In re* Durkin, 10 Hun (N. Y.) 269.

⁵⁶ Bayer v. Hoboken, 44 N. J. L. 131.

⁵⁷ Tisdale v. Town of Minonk, 46 Ill. 9.

⁵⁸ Haskell v. Bartlett, 34 Cal. 281. Where publication is directed to be made in an *adjoining* municipality in the absence of any local news-

paper, a leading paper in a large city not far distant which circulates in the municipality may be resorted to in preference to the local paper of a village lying nearer in point of fact than the city. Gallerno v. Rochester, 46 U. C. Q. B. 279.

⁵⁹ People v. Board of Supervisors, 27 Cal. 655.

⁶⁰ Law v. People, 87 Ill. 389.

⁶¹ *Ex parte* Bedell, 20 Mo. App. 125.

⁶² Moss v. Oakland, 88 Ill. 109.

or ordinance. A notice requires no particular collocation of words so long as it conveys a clear idea of its subject, but a statute or ordinance has no legal existence except in the language in which it is passed.⁶³ Hence, where a notice is by statute required to be published in a paper printed in the German language, the notice must be printed in the German language; but when a statute or ordinance is required to be published in the same paper it must, in default of legislative direction to the contrary, be printed in the English language.⁶⁴

§ 137. Time and period.—When no time is designated publication may be made at any time.⁶⁵ A provision for publication for a certain time before taking effect requires but one insertion.⁶⁶ A requirement of publication “for five successive days” in a daily newspaper is complied with by publication for five successive week days, although a Sunday intervenes on which there was no issue.⁶⁷ The day of issue and delivery of the paper is the first day of the period regardless of the date of the paper.

A requirement of publication “for at least one week” in a newspaper published in the city is complied with by one publication if the paper is a weekly paper, but if made in a daily paper it must appear in each issue for one week.⁶⁸

§ 138. Proof of publication.—It is commonly provided that proof of publication may be made by the certificate of the

⁶³ *State v. Mayor*, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

⁶⁴ *State v. Mayor*, *supra*.

⁶⁵ *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278. The charter provided that “the council shall cause all publications made by authority of the city to be inserted in the first column of the third page of the newspaper doing the city printing.” The ordinance was passed May 4th, and not published until September 9th following, between which dates several meetings of the council had taken place.

⁶⁶ *Hoboken v. Gear*, 27 N. J. L. 265; *State v. Hardy*, 7 Neb. 377; *Commonwealth v. Matthews*, 122 Mass. 60.

⁶⁷ *Ex parte Fisk*, 72 Cal. 125; *Taylor v. Palmer*, 31 Cal. 240. When the publication is required to be in the official paper of the city it is sufficient if it is published as often as the paper is issued. *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768.

⁶⁸ *Union P. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619.

clerk under the seal of the corporation. A mere memorandum entered on the ordinance is insufficient as a certificate.⁶⁹ Where the publication must be in a paper "published in the city," there must be proof of publication and of the place of publication.⁷⁰

⁶⁹ Thus, in *Hutchison v. Mt. Vernon*, 40 Ill. App. 19, it was held that the words "published July 17, 1890. Attest, B. B. Slade," was "nothing more than a memorandum of the

fact and date, so that thereafter a certificate thereof might be readily made when required."

⁷⁰ *Hutchison v. Mt. Vernon*, 40 Ill. App. 19.

CHAPTER XIV.

THE VALIDITY OF ORDINANCES.

§ 139. General statement.	§ 154. Handling of trains.
140. Ordinances valid in part.	155. Regulation of street rail-ways.
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§ 139. General statement.—An ordinance may be void because of want of power in the corporation to enact it, the failure to observe prescribed formalities in its enactment, or because contrary to certain general principles of law. As a rule the questions arise upon the validity of ordinances enacted under general authority to legislate with reference to a certain subject-matter. Thus, when a city is granted the power to regulate and control its streets, it is authorized to exercise the general power by means of ordinances enacted in accordance with the provisions of the charter and the general rules of law.

§ 140. Ordinances valid in part.—Certain sections or parts of sections of an ordinance may be held invalid without affecting the validity of what remains, if the parts are not so interblended and dependent that the vice of one necessarily vitiates the others. It is only necessary “that the good and bad parts be so distinct and independent that the invalid parts may be eliminated and that what remains contain all the essentials of a complete ordinance.”¹ The fact that the penal provision for the enforcement of an ordinance is void does not invalidate its other provisions, the valid part being complete and independent of the void portion.² As said by the supreme court of the United States, with reference to statutes: “These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.”³

An ordinance may be valid as to certain persons or sales and invalid as to others.⁴ Thus, an ordinance which forbids the sale of malt liquors, which the corporation has power to do, and also of spirituous liquors, which it has not power to do, is valid as to the former and invalid as to the latter.⁵ So, where the general law permits the sale of liquor in quantities of five gallons or more without a license, an ordinance which prohibits all sale of liquors without a license is valid as to sales in quantities of less than five gallons.⁶ But when the remaining part of the ordinance does not express the legislative intent,⁷ or the

¹ *In re Bizzell*, 112 Ala. 210, 21 So. 371; *City of Detroit v. Fort Wayne, etc. R. Co.*, 95 Mich. 456, 54 N. W. 958, 35 Am. St. 580, 20 L. R. A. 79; *Ex parte Stephen*, 114 Cal. 278.

² *Magnean v. Fremont*, 30 Neb. 843, 9 L. R. A. 786.

³ *Polindexter v. Greenhow*, 114 U. S. 270, at 305; *State v. Webber*, 107 N. C. 962, 22 Am. St. 920; *In re Wong Hane*, 108 Cal. 680, 49 Am. St. 138; *City of Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. 678; *In re Haskell*,

112 Cal. 412, 32 L. R. A. 527; *State v. Hardy*, 7 Neb. 377; *St. Louis v. St. Louis Ry. Co.*, 89 Mo. 44; *Belle-ville v. Citizens' Horse Car Co.*, 152 Ill. 171, 26 L. R. A. 681; *Donnersberger v. Prendergast*, 128 Ill. 229; *Koch v. North Ave. R. Co.*, 75 Md. 222, 15 L. R. A. 377.

⁴ *Ex parte Cowert*, 92 Ala. 94, 9 So. 225.

⁵ *Eldora v. Burlingame*, 62 Iowa, 32; *Cantril v. Sainer*, 59 Iowa, 26.

⁶ *State v. Priestler*, 43 Minn. 373.

⁷ *In re Wong Hane*, 108 Cal. 680, 49 Am. St. 138.

objectionable part is the compensation for or inducement to the unobjectionable part, so that it is apparent that the latter part would not have been enacted alone, the whole is invalid.⁸

§ 141. The nature of an ordinance.—A municipal ordinance is a local law prescribing a general rule of action, and is as binding upon the people within the municipality as are the acts of the legislature upon the citizens of the state.⁹ When applicable to every part of the city it is a general law, and not in conflict with a constitutional provision prohibiting local legislation.¹⁰ It is binding upon all who are within the limits of the municipality;¹¹ and any person who contracts with reference to a matter governed by an ordinance is charged with notice of its

⁸ *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 353, 64 N. W. 999; *Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. 559, and note to *City of Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. 678, 683.

⁹ *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 41 L. ed. 518; *Buffalo v. New York, etc. Ry. Co.*, 152 N. Y. 276, 46 N. E. 496; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261. "Ordinances are not merely rules or regulations in the ordinary sense of those terms; but, as the derivation of the word would indicate, they are in the nature of laws, being decreed by a body vested with definite legislative authority coupled with the power to enforce obedience to its enactment." *Horr & Bemis, Mun. Pol. Ord.*, sec. 12; *Hopkins v. Mayor*, 4 M. & W. 621, 640, per Lord Abinger; *Village of St. Johnsbury v. Thomson*, 59 Vt. 800; *State v. Tryon*, 39 Conn. 183; *Bearden v. Madison*, 73 Ga. 184; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, at 508; *Starr v. Burlington*, 45 Iowa, 87; *St. Louis v. Boffinger*, 19 Mo. 13; *Jones v. In-*

surance Co., 2 Daly (N. Y.) 307; *McDermott v. Board*, 5 Abb. Pr. (N. Y.) 422; *Gabel v. Houston*, 29 Tex. 335; *Burmeister v. Howard*, 1 Wash. Terr. 207. A city council "is a miniature general assembly, and their authorized ordinances have the force of laws passed by the legislature of the State." *Scott, J.*, in *Taylor v. Carondelet*, 22 Mo. 105; *St. Louis v. Foster*, 52 Mo. 513. Contracts between the inhabitants of a city in violation of the provisions of a valid ordinance are illegal and cannot be enforced. *Milne v. Davidson*, 5 Mart. N. S. (La.) 586. But see *Baker v. Portland*, 58 Me. 199, 10 Am. L. Reg. (N. S.) 559, note.

¹⁰ *Foster v. Police Com'rs*, 102 Cal. 183, 41 Am. St. 194.

¹¹ *City Ry. Co. v. Mayor*, 77 Ga. 731, 4 Am. St. 106. In *Bott v. Pratt*, 33 Minn. 323, the court, by *Vanderberg, J.*, said: "An ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute or other laws of the commonwealth, and all persons interested are bound to take notice of their exist-

provisions.¹² But police ordinances, although their violation may be punished by fine and imprisonment, are only *quasi-criminal* laws.¹³ They are not criminal laws within the general meaning of the term, although the procedure for their enforcement is generally criminal in form and may be in the name of the state. Hence, a conviction under an ordinance for keeping a house of ill-fame is not a bar to a conviction for the same offense under the general law of the state.¹⁴ The violation of one ordinance is not properly a crime against public law.¹⁵ Hence a defendant when prosecuted under an ordinance is not entitled to a jury trial.¹⁶ But the courts are not always consistent, at least in the use of language. Thus, it was said¹⁷ of ordinances: "They come strictly within the definition of 'crimes or criminal offenses.' The terms 'crime,' 'offense' and 'criminal offense' are all synonymous, and ordinarily used interchangeably, and include any breach of law established for the protection of the public, as distinguished from an infringement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding." But the same court held¹⁸ that a city council might lawfully enact an ordinance

ence. *Heland v. Lowell*, 3 Allen (Mass.), 407; *Vandines' Case*, 6 Pick. 187; *Gilmore v. Holt*, 4 Pick. 257; *Johnson v. Simonton*, 43 Cal. 242, 249." Compare *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502.

¹² *North Birmingham Ry. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. Rep. 649. In *Ewing v. Webster City*, 103 Iowa, 226, 72 N. W. 511, the court said: "It is the established rule of this state that, for most purposes at least, the violation of a municipal ordinance enacted by authority of the state is a crime, and that proceedings for its punishment are criminal."

¹³ *State v. Webber*, 107 N. C. 962, 22 Am. St. 920; *State v. Bonnell*, 42 La. Ann. 1110, 21 Am. St. 413, 10 L. R. A. 60.

¹⁴ *State v. Lee*, 29 Minn. 445, 13 N. W. 913; *State v. Harris*, 50 Minn. 128; *Wragg v. Penn. Tp.*, 94 Ill. 11, at 23; *Shafer v. Mumma*, 17 Md. 331; *Brownville v. Cook*, 4 Neb. 101. See an extensive note to *State v. Robitshek*, in 33 L. R. A. 33.

¹⁵ *Ex parte Hollwedell*, 74 Mo. 395, at 401; *Platteville v. McKernan*, 54 Wis. 487; *City of Goshen v. Croxton*, 34 Ind. 239.

¹⁶ *Byers v. Conn.*, 42 Pa. St. 89; *Howe v. Plainfield*, 37 N. J. L. 145, at 151; *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 505; *Contra*, *State v. West*, 42 Minn. 147, 43 N. W. 845; *State v. Harris*, 50 Minn. 128, 52 N. W. 387.

¹⁷ *State v. West*, 42 Minn. 147.

¹⁸ *State v. Robitshek*, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33, annotated. The court said: "Prosecutions thereunder are in the

which in effect prohibited any one not a policeman from instituting a prosecution for failing to keep a saloon closed on Sunday, on the ground that "municipal ordinances are not criminal statutes; that violations thereof are not crimes, nor are such violations governed by the rules of the criminal law, save in certain specified exceptional particulars."

§ 142. Injunctions—Invalid ordinances.—The passage of an ordinance is a legislative act, and it is well settled that the legislative acts of a municipal corporation will not be restrained by injunction.¹⁹ But when an ordinance is invalid and the case falls within any of the common heads of equity, a court will enjoin the enforcement of the ordinance in order to protect private rights.²⁰ Ordinances are penal in their nature, and the validity of criminal laws will not be tested by injunction; but this rule is "subordinate to the general principle that equity will grant relief where there is not a plain, adequate and complete remedy at law, and when it is necessary to prevent an irreparable injury."²¹ Thus, an injunction was granted to restrain the enforcement of an invalid ordinance which imposed certain restrictions upon articles of merchandise and subjected the seller to an action for a violation of the ordinance.²² But where the plaintiff had been twice convicted and fined for violating an ordinance requiring grain to be weighed on city scales and had appealed, and pending the appeal brought a suit to restrain the city from further prosecuting him or any of his customers on the ground that the ordinance was void, the injunction was denied on the ground that the plaintiff could avoid a multiplicity of suits by obeying the ordinance pending the appeal, and that the loss and

name of the state by express provision of the charter, as a matter of convenience; and they are, at most, merely *quasi*-criminal in form. They are simply local police regulations or by-laws for the government of the municipality, and have no reference to or connection with the administration of the criminal laws of the state. Originally the only method of enforcing them was by civil action, brought by the municipality in its own name to recover such penalty as

was prescribed for a violation."

¹⁹ *New Orleans Water Works v. New Orleans*, 164 U. S. 471; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *High, Inj.*, § 1246.

²⁰ *New Orleans Water Works v. New Orleans*, 164 U. S. 471; *Baltimore v. Radecke*, 49 Md. 217.

²¹ *Austin v. Austin Cemetery Ass'n*, 87 Tex. 330. See *Vegelahn v. Guntner*, 167 Mass. 92.

²² *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. 556.

convenience which he would thereby suffer would not be so great as to warrent the interference of a court of equity.²³

The general principle has been announced that a municipal corporation will be enjoined from performing a threatened act which constitutes a manifest abuse of its discretion, to the oppression of the citizens.²⁴

I. GENERAL PRINCIPLES GOVERNING VALIDITY.

§ 143. Must conform to charter.—As all ordinances are enacted for the purpose of carrying into effect powers granted by the charter, it necessarily follows that they must in all things conform to the charter.²⁵

§ 144. Must not contravene the constitution.—Municipal ordinances are subject to the restrictions imposed by the constitution of the state and of the United States, and when repugnant to either are void.²⁶ Thus, an ordinance impairing the obligation of a contract,²⁷ or taking property without due process of law,²⁸ or making unjust discriminations between citizens, in violation of the fourteenth amendment to the constitution,²⁹ or attempting to regulate interstate commerce, is void.³⁰ It seems that a person has a constitutional right to associate with criminals, and an ordinance forbidding any one knowingly to associate with persons having the reputation of criminals is an invasion of the

²³ *Ewing v. Webster City*, 103 Iowa, 226, 72 N. W. 511.

²⁴ *Atlanta v. Holliday*, 96 Ga. 546, 26 S. E. 509.

²⁵ *People v. Armstrong*, 73 Mich. 288, 41 N. W. 375, 2 L. R. A. 721, 16 Am. St. 578; *Thompson v. Carroll*, 22 How. (U. S.) 422, 16 L. ed. 387; *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *Com. v. Roy*, 140 Mass. 432; *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473; *State v. Nashville*, 15 Lea (Tenn.), 697, 54 Am. Rep. 427; *State v. Municipal Court*, 32 Minn. 329; *Rothschild v. Darien*, 69 Ga. 503; *State v. Belvidere*, 44 N. J. L. 350.

²⁶ *Ex parte Felchlin*, 96 Cal. 360,

31 Am. St. 223; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230; *Mt. Pleasant v. Vansice*, 43 Mich. 361; *Baldwin v. Smith*, 82 Ill. 162; *Illinois Central R. R. Co. v. Bloomington*, 76 Ill. 447; *Vance v. Little Rock*, 30 Ark. 435; *Judson v. Reardon*, 16 Minn. 435.

²⁷ *Savings Society v. Philadelphia*, 31 Pa. St. 175, 72 Am. Dec. 730; *Kansas City v. Corrigan*, 86 Mo. 67.

²⁸ *Baldwin v. Smith*, 82 Ill. 162.

²⁹ *State v. Dering*, 84 Wis. 585, 36 Am. St. 948.

³⁰ *Moran v. New Orleans*, 112 U. S. 69.

constitutional right of personal liberty.³¹ An ordinance which authorizes a fire warden to arrest and detain any person who, at a fire, without sufficient excuse refuses to obey his orders is unconstitutional as depriving the person of his liberty without due process of law.³² An ordinance discriminating against the Chinese in granting laundry licenses is void as contravening the fourteenth amendment.³³

§ 145. Must conform to law.—Ordinances must not only conform to the charter and the constitution, but when enacted in pursuance of implied power they must be consistent with the general laws and policy of the state.³⁴ If contrary to the general laws or declared policy of the state they are void.³⁵

³¹ *Ex parte* Smith, 135 Mo. 223, 33 L. R. A. 606.

³² *Judson v. Reardon*, 16 Minn. 431 (Gil. 387).

³³ *Yick Wo v. Hopkins*, 118 U. S. 356; *In re Tle Loy*, 26 Fed. 611. See, also, *Soon Hing v. Crowley*, 113 U. S. 703; *Barbier v. Connolly*, 113 U. S. 27. An ordinance declaring steamboats emitting dense smoke a nuisance is valid as affecting boats on the Chicago river. *Harmon v. Chicago*, 110 Ill. 400. A penalty for violating an ordinance is not a debt within the meaning of the constitutional provision prohibiting imprisonment for debt. *Hardenbrock v. Town of Ligonier*, 95 Ind. 70.

³⁴ *Burg v. Chicago, etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419; *Katzenberger v. Laws*, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185, 25 Am. St. 681. See note to this case in 13 L. R. A. 185. *Volk v. Newark*, 47 N. J. L. 117; *Lozier v. Newark*, 48 N. J. L. 452; *Robinson v. Mayor of Franklyn*, 1 Humph. (Tenn.) 156; *Mays v. Cincinnati*, 1 Ohio St. 268; *Canton v. Nist*, 9 Ohio St. 439, 34 Am. Dec. 625; *Carr v. St. Louis*, 9 Mo. 191; *Du Bois v. Augusta, Dudley* (Ga.), 30; *Adams*

v. Mayor, etc., 29 Ga. 56; *Southport v. Ogden*, 23 Conn. 128; *Wirth v. Wilmington*, 68 N. C. 24; *State v. Austin*, 114 N. C. 855, 41 Am. St. 817; *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425. In *Flood v. State*, 19 Tex. App. 584, it is said: "An ordinance, to be valid, unless such legislative authority be given for its enactment, must not conflict with the statute, but must conform to the laws of the state." An ordinance which prohibits traffic in intoxicating liquors is not an illegal interference with business. *Fanner v. Alliance*, 29 Fed. 169; *Markle v. Akron*, 14 Ohio, 586. An ordinance enacted under the police power, prescribing a penalty for the non-observance of Sunday in the conduct of certain business, is not repugnant to the state law because it exempts from its operation certain occupations not exempted by the state law. *Thiesen v. McDavid*, 34 Fla. 440, 26 L. R. A. 234. The king cannot authorize the making of a by-law contrary to the law of the realm. Chief Justice Hobart, in *Norris v. Staps* (1617), Hob. 210.

³⁵ See *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741.

A grant of power to a municipal corporation to make by-laws for its own government and the regulation of its own police "cannot be construed as imparting to it power to repeal the laws in force or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication unless the exercise of the power given be inconsistent with the previous law and does necessarily operate as its repeal *pro tanto*. Nor can the assumption be indulged that the legislature intended that an ordinance passed by the city should be superior to or take the place of the general law of the state upon the same subject."⁸⁶

A general law does not repeal an existing special law unless such clearly appears to have been the legislative intention. Thus, a grant of power to provide for the punishment of a designated offense, contained in a city charter, is not repealed by a subsequently enacted general statute providing for the prosecution of the same offense throughout the state.⁸⁷ But the powers granted must be exercised in conformity to the general criminal laws. Thus, under authority to prohibit variety shows, a city cannot group together a certain number of acts in themselves lawful, and by calling the result a variety show prohibit the performance.⁸⁸

When an ordinance is specifically authorized by the charter it has the effect of a special law of the legislature within the limits of the municipality, and supersedes the general law. It operates to repeal the general law on the principle that provisions of different statutes which are in conflict with one another cannot stand together; and in the absence of anything showing a different intent on the part of the legislature, gen-

⁸⁶ *March v. Com.*, 12 B. Mon. (Ky.) 25, *Simpson, C. J.* See *Sutton's Hospital Case*, 10 Reports, 31a; *Rex v. Maidston*, 3 Burr. 1837.

⁸⁷ *State v. Labatate*, 39 La. Ann. 513, 2 So. 550; *Covington v. St. Louis*, 78 Ill. 548. *Contra*, *Southport v. Ogden*, 23 Conn. 128. In *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124, it was held that a subsequent general law did not, by implication, work the repeal of a special law on the same subject

although inconsistent with it. An act of the legislature making the offense of keeping a house of ill-fame a felony and punishable as such was held not to repeal by implication a provision of the charter of Detroit authorizing the common council to prohibit, prevent and suppress the keeping of such houses and ordinances enacted thereunder.

⁸⁸ *Ex parte Bell*, 32 Tex. Cr. Rep. 308, 42 Am. St. 778.

eral legislation upon a particular subject is repealed by subsequent special legislation upon the same subject.³⁹

§ 146. Must not contravene common right.—It is said that there can be no implied power to enact an ordinance which contravenes common right. It is somewhat difficult to determine what is meant by a common right, and no clear definition is found in the cases.⁴⁰ The rule has often been used merely as a makeweight in decisions which should have been put flatly on other grounds. Its true meaning seems to be that the general power of a municipal corporation to pass local police ordinances concerning the exercise of a property or a public right by a citizen extends only to the making of reasonable regulations, and does not extend to the prohibiting or destroying the exercise of the right altogether.⁴¹

§ 147. Must be general and impartial.—Ordinances should be general in their nature and impartial in their operation. Unwarranted discrimination or oppressive interference in particular instances will render an ordinance invalid.⁴² An ordinance prohibiting a specified railroad corporation from running locomotives by steam on a certain street does not contravene this principle, when no other person or corporation has the right to run locomotives on that street. Hence, said the court, “no other person or corporation is or can be in a like situation, except with the consent of the city. On this account the ordinance, while apparently limited in its operation, is in effect gen-

³⁹ *St. Johnsbury v. Thompson*, 59 Vt. 300; *In re Snell*, 58 Vt. 207; *State v. Clark*, 54 Mo. 17; *Mark v. State*, 97 N. Y. 572; *State v. Morristown*, 33 N. J. L. 57.

⁴⁰ The principle of the above section is recognized in *Anderson v. City of Wellington*, 40 Kan. 173, 2 L. R. A. 110, 10 Am. St. 175; *In re Flaherty*, 105 Cal. 558, 27 L. R. A. 529; *Hayden v. Noyes*, 5 Conn. 391; *City Council v. Ahrens*, 4 Strob. (S. C.) L. 241.

⁴¹ See 1 *Dillon, Mun. Corp.* (4th ed.) § 325 and cases cited.

⁴² *Detroit v. Ft. Wayne, etc. Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 35

Am. St. 580, 20 L. R. A. 79; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. 230; *Lindall v. Covington*, 90 Ky. 444, 29 Am. St. 398; *In re Flaherty*, 105 Cal. 558, 27 L. R. A. 529; *Ex parte Chin Yan*, 60 Cal. 78; *Zanone v. Mound City*, 103 Ill. 552; *Ingaman v. Chicago*, 78 Ill. 405; *Champer v. Greencastle*, 138 Ind. 339, 46 Am. St. 390. That an ordinance manifestly intended as a sanitary regulation is made to apply only to a part of the city does not render it invalid, if that part is so situated as to require particular and exceptional provisions. *Com. v. Patch*, 97 Mass. 221.

eral, as it applies to all who can do what is prohibited.”⁴³ An ordinance containing a grant may reserve the right to impose restrictions not imposed upon other persons or corporations. Such ordinances are necessarily several and independent of each other, and the conditions imposed and requirements exacted are necessarily different, as the conditions and circumstances vary.⁴⁴

§ 148. Must not be oppressive.—An ordinance which is unjust and oppressive in its character and operation is invalid.⁴⁵ Thus, an ordinance which compelled the substitution of a cement sidewalk in the place of a plank walk in front of a twenty-acre vacant lot, the plank walk having been laid only six months before in conformity with an ordinance, and being still safe, sufficient and in good condition, was held void, because unreasonable, unjust and oppressive.⁴⁶

§ 149. Must be reasonable.—Probably the most important general rule affecting ordinances enacted under some authority in general terms is that which makes them invalid if wholly unreasonable.⁴⁷ When an ordinance is passed under specific statutory authority, which authorizes the ordinance in the terms in which it is made, the question of its reasonableness cannot be raised.⁴⁸ In all other cases an unreasonable ordinance is invalid,

⁴³ *Railway Co. v. Richmond*, 96 U. S. 521.

⁴⁴ *Detroit v. Ft. W., etc. Ry. Co.*, 95 Mich. 456, 20 L. R. A. 79. An ordinance which prohibits certain occupations on Sunday is valid, although it excludes certain other occupations from its operation. See *Theisen v. McDaniel*, 34 Fla. 440, 26 L. R. A. 234.

⁴⁵ *Mayor v. Beasley*, 1 Humph. (Tenn.) 232; *Mayor v. Winfield*, 8 Humph. (Tenn.) 707; *St. Louis v. Weber*, 44 Mo. 547; *Baltimore v. Radecke*, 49 Md. 217; *St. Louis v. Fitz*, 53 Mo. 582; *Commissioners v. Gas Co.*, 12 Pa. St. 318.

⁴⁶ *Hawes v. Chicago*, 158 Ill. 658, 30 L. R. A. 225. For applications of the same principle, see *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A.

568; *Palmer v. Danville*, 158 Ill. 156; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487.

⁴⁷ *Johnson v. Mayor of Croydon* (1886), 16 Q. B. D. 708, 7 Eng. Rul. Cas. 278, and many early cases cited in the English and American notes. Many cases are also collected in a note to 35 Am. Rep. 702.

⁴⁸ *Phillips v. Denver*, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; *Champer v. Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390. In *Belling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272, the court said: “It is well settled that when the adoption of a municipal ordinance or by-law is expressly authorized by the legislature, and when the express grant of power is not in conflict with a

and the question of reasonableness must be determined in the light of the particular circumstances. An ordinance may be reasonable and valid as to one state of facts and circumstances, and unreasonable and invalid when applied to facts and circumstances of a different character.⁴⁹

§ 150. Reasonableness a question for the court.—The question of the reasonableness of an ordinance must be decided by the court with due regard to all existing circumstances and conditions, the object sought to be attained, and the necessity for the adoption of the ordinance.⁵⁰ It may be determined by an inspection of the ordinance or after hearing evidence. But such evidence must be directed to the court and not to the jury.⁵¹

constitutional prohibition or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal."

Coal Float v. Jeffersonville, 112 Ind. 15, 13 N. E. 115; *Ex parte Chin Yan*, 60 Cal. 78; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231. "Where an ordinance is based upon a general power, and its provisions are more specific and detailed than the expression of the power conferred, the court will look into the reasonableness of such provisions." *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076. And see *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, and *Darlington v. Ward*, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326.

⁴⁹ *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305.

⁵⁰ *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; *Kip v. Paterson*, 26 N. J. L. 298; *State v. East Orange*, 41 N. J. L. 127; *State v. Orange*, 50 N. J. L. 389, 13 Atl. 240; *Ex parte Frank*, 52 Cal. 606; *Kneedler v. Norristown*, 100 Pa. St. 368; *Com. v. Worcester*, 3 Pick. 462; *Neier v. Missouri Pac. Ry. Co.*, 12

Mo. App. 25; *St. Louis v. Weber*, 44 Mo. 547.

⁵¹ *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076. In *Evison v. C., M. & St. P. Ry. Co.*, 45 Minn. 370, Mr. Justice Mitchell said: "An ordinance is in the nature of a local statute, and it would seem anomalous to leave it to the jury to determine whether a law is valid. Certainly, if the invalidity is apparent on the face of the statute or ordinance, it has always been held a question of law for the court, and we cannot perceive why a rule should be different where the invalidity is made to appear from extrinsic facts. Any other rule would lead to the embarrassing result that, upon the same state of facts, one jury might hold an ordinance valid and another jury hold it invalid." In *Clason v. Milwaukee*, 30 Wis. 316, and *Austin v. Austin Cemetery Ass'n*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114, it was held that where the question of reasonableness depended upon the existence of certain facts of which the court had not judicial knowledge, such facts might be submitted to the jury. But in *Mercer County v. Fleming*, 111 Cal. 46, it was said

§ 151. Presumption of reasonableness.—The presumption is in favor of the reasonableness of the ordinance.⁵² The party asserting its illegality must set forth the facts in his pleading and sustain the burden of proof.⁵³ It requires a clear and strong case to justify the court in holding an ordinance invalid when the corporation is acting within the apparent scope of its authority. As said in a recent case, “The judicial power to declare it void can only be exercised when from the inherent character of the ordinance, or from evidence taken showing its operation, it is demonstrated to be unreasonable.”⁵⁴

In assuming the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will be exercised with the highest discretion, and, when it is plainly granted, a clear case should be made to authorize an interference on the ground of unreasonableness.⁵⁵ “This, we think, is the true rule,” said Crockett, J., “and it proceeds upon the theory that, under a general grant of power to a municipal corporation to pass ordinances on a given subject, it will be presumed that it was not intended to clothe it with power to pass an ordinance which is clearly unreasonable, unjust, oppressive, partial and unfair; or which contravenes public policy or is in restraint of trade. But an ordinance will not be presumed invalid on either of these grounds unless in a plain case.”⁵⁶

that the question must be determined from an inspection of the ordinance, and that evidence could not be received to show the manner in which it was or might be enforced. See, also, *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. 249.

⁵² *Mayor v. Dry Dock R. Co.*, 133 N. Y. 104; *People v. Creiger*, 138 Ill. 401, 28 N. E. 812.

⁵³ *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. 249.

⁵⁴ *State v. City of Trenton*, 53 N. J. L. 132, 20 Atl. Rep. 1076; *Paxton v. Sweet*, 30 N. J. L. 196; *Lewis v. Newton*, 75 Fed. 884; *Littlefield v. State*, 42 Neb. 223, 47 Am. St. 697; *Mayor v. Dry*

Dock, etc. Ry. Co., 133 N. Y. 104, 28 Am. St. 609; *White v. Kent*, 11 Ohio St. 550; *Com. v. Patch*, 97 Mass. 221; *Van Hook v. Selma*, 70 Ala. 361. Contemporaneous construction cannot be considered when the meaning is clear from the language of the act. *Wesson v. Collins*, 72 Miss. 844, 18 So. 360, 917.

⁵⁵ *St. Louis v. Weber*, 44 Mo. 547; *Kansas City v. Cook*, 30 Mo. App. 660; *Duluth v. Mallett*, 43 Minn. 204.

⁵⁶ *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Grand Rapids v. Braudy*, 105 Mich. 670, 32 L. R. A. 116; *Swift v. Topeka*, 43 Kan. 671, 8 L. R. A. 772.

II. ILLUSTRATIONS OF VALID AND INVALID ORDINANCES.

§ 152. Laying pipes in streets.—An ordinance prohibiting the opening of streets for the purpose of laying gas mains between the first of December and the first of the following March is reasonable,⁵⁷ although an ordinance entirely prohibiting the opening of a paved street for the purpose of laying pipes from the main to the opposite side of the street is unreasonable, as it would tend to increase the price of gas by requiring mains to be laid on each side of the street.⁵⁸

§ 153. Location and speed of vehicles.—A city may reasonably require stages or other such vehicles to keep off certain narrow and crowded streets,⁵⁹ or prohibit vehicles containing perishable produce to stand in a public street longer than twenty minutes between certain hours of the day.⁶⁰ So it may properly provide that a hackney coach shall not stand within thirty feet of any public place of amusement,⁶¹ and that vehicles used for hire shall occupy only certain designated stands.⁶² The speed of vehicles on streets may be regulated,⁶³ even without express authority.⁶⁴ But an ordinance prohibiting driving on a street

⁵⁷ *Commissioners v. Gas Co.*, 12 Pa. St. 318; *Commissioners v. North Liberties Gas Co.*, 2 Jones, 318.

⁵⁸ *Commissioners v. North Liberties Gas Co.*, 2 Jones, 318. An ordinance regulating the stringing of wires in a city, which provides that "whenever it shall be necessary to cross the line of any existing telephone line or lines * * * the person or company making such crossing shall supply all necessary safeguards for the same," is reasonable. *State v. Janesville, etc. Ry. Co.*, 87 Wis. 72, 41 Am. St. Rep. 23.

⁵⁹ *Com. v. Stodder*, 2 Cush. 563; *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387. See *supra*, § 66.

⁶⁰ *Com. v. Brooks*, 109 Mass. 355. An ordinance prohibiting vehicles from standing in the street more than twenty minutes applies to

licensed peddlers. *Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653.

⁶¹ *Com. v. Robertson*, 5 Cush. 439.

⁶² *Com. v. Matthews*, 122 Mass. 60. Fixing the fare which may be charged by coaches. *Com. v. Gage*, 118 Mass. 328. Imposing a moderate tax upon all vehicles used on the streets. *St. Louis v. Green*, 70 Mo. 562. The place may be determined by a marshal or policeman. *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644; *St. Paul v. Smith*, 27 Minn. 364.

⁶³ *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305, and note; *Scudder v. Hinshaw*, 134 Ind. 56; *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362; *People v. Little*, 86 Mich. 125.

⁶⁴ *Reynolds v. Mandain*, 4 Harr. (Del.) 317; *Mittelstadt v. Morrison*, 76 Wis. 265.

at a speed of more than six miles an hour is unreasonable when applied to the members of a salvage corps when responding to an alarm of fire.⁶⁵

§ 154. **Handling of trains.**—A city may regulate the running of railway trains across and over its streets, but the ordinances must be reasonable and take into consideration the various conditions existing in different parts of the city.⁶⁶ An ordinance limiting the speed to six miles per hour is reasonable;⁶⁷ but a limitation to four or six miles an hour is unreasonable when applied to that part of the road in the suburbs of the city, where the road is securely fenced on each side and there is but one grade crossing.⁶⁸ Ordinances forbidding trains from standing across a public street longer than two minutes,⁶⁹ or from stopping on a street crossing for any other purpose than to prevent accident in the face of immediate danger,⁷⁰ or requiring railway companies to keep flagmen at dangerous crossings,⁷¹ or prohibiting boys and others not connected with the train service from getting on or off moving trains within the city limits,⁷² are reasonable and valid. But ordinances requiring railway companies to

⁶⁵ *State v. Sheppard*, 64 Minn. 287.

⁶⁶ *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; *Evison v. Chicago, etc. R. Co.*, 45 Minn. 370, 11 L. R. A. 434; *Buffalo v. New York, etc. R. Co.*, 152 N. Y. 276, 46 N. E. 496; *Prewitt v. Missouri, etc. Ry. Co.*, 134 Mo. 615, 36 S. W. 667; *Larkin v. Burlington, etc. Ry. Co.*, 85 Iowa, 492; *Gratiot v. Mo. Pac. Ry. Co.*, 116 Mo. 450, 16 L. R. A. 189; *Pennsylvania Co. v. Horton*, 132 Ind. 187; *Burg v. Chicago, etc. R. Co.*, 90 Iowa, 106.

⁶⁷ *Knobloch v. Railway Co.*, 31 Minn. 402, 18 N. W. 106; *Buffalo v. New York, etc. Ry. Co.*, 152 N. Y. 276, 46 N. E. Rep. 496; *Com. v. Worcester*, 3 Pick. 461; *Gahagan v. Railway Co.*, 1 Allen, 187.

⁶⁸ *Evison v. Chicago, etc. Ry. Co.*, 45 Minn. 370; *Burg v. Chicago, etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St.

419. See *Larkin v. Burlington, etc. Ry. Co.*, 85 Iowa, 492, 52 N. W. 480. Local trains may be excepted from the operation of an ordinance. *Buffalo v. New York, etc. Ry. Co.*, 152 N. Y. 276, 46 N. E. 496.

⁶⁹ *State v. Mayor, etc.*, 37 N. J. L. 348; *Birmingham v. Alabama, etc. Ry. Co.*, 98 Ala. 134, 13 So. 141.

⁷⁰ *Duluth v. Mallett*, 43 Minn. 204.

⁷¹ *Railway Co. v. East Orange*, 41 N. J. L. 127. In *Village of Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445, it was held that municipal corporations in Ohio have no power to compel a railway company to keep a watchman at their crossings, and see *Pittsburg, etc. R. Co. v. Crown Point*, 146 Ind. 421, 35 L. R. A. 684.

⁷² *Reardon v. Madison*, 73 Ga. 184.

keep flagmen by day and red lanterns by night at ordinary crossings where there is no unusual danger,⁷³ or prohibiting a railway company between 6 A. M. and 11 P. M. from moving its cars across the street for the purpose of being distributed in their yards, without regard to whether they are stopped on the street, are unreasonable.⁷⁴ So an ordinance which requires a railroad company, whose only scheduled train at night passes at eight o'clock, to light each street which it crosses with an electric light from dark to dawn, is unreasonable and void.⁷⁵

§ 155. Regulation of street railways.—Street railways are subject to a variety of regulations that are rendered reasonable and necessary by reason of the conditions surrounding their business. Thus, they may by ordinance be required to make quarterly reports of the number of passengers,⁷⁶ to pave the sides of the streets through which they run,⁷⁷ and to provide a driver and conductor on each car.⁷⁸

§ 156. Parades, music, and speaking in public places.—It is very doubtful whether a city can, under the general power over its streets, prohibit their use for the purpose of parades and processions. But it may regulate such uses by prescribing the time and manner of the use, and may make the right conditional upon the consent of certain officials. But the actions of the official must be governed by a prescribed general rule. It cannot be left to the arbitrary discretion of the official.⁷⁹ An ordinance

⁷³ Toledo, etc. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.

⁷⁴ Birmingham v. Alabama, etc. Ry. Co., 98 Ala. 134, 13 So. 141.

⁷⁵ Cleveland, etc. R. Co. v. Connersville, 147 Ind. 277, 37 L. R. A. 175.

⁷⁶ St. Louis v. St. Louis Ry. Co., 89 Mo. 44.

⁷⁷ City v. Erie Pass. Ry. Co., 7 Phil. 321.

⁷⁸ South Cov., etc. Ry. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026; State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076.

⁷⁹ See § 165, *post*; State v. Der- ing, 84 Wis. 585, 36 Am. St.

948, 19 L. R. A. 859, annotated; *In re Frazee*, 63 Mich. 396, 6 Am. St. 310. Street parades cannot be prohibited (*Rich v. Naperville*, 42 Ill. App. 222; *Bloomington v. Richardson*, 38 Ill. App. 60; *People v. Rochester*, 44 Hun (N. Y.), 166; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *State v. Hughes*, 72 N. C. 25), but may be regulated in order to prevent their becoming a public annoyance. *Charlton v. Simmons*, 87 Iowa, 226; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142; *State v. White*, 64 N. H. 48; *Roderick v. Whitson*, 51 Hun (N. Y.) 620; *White v. State*, 99 Ga. 16, 37 L. R. A. 642.

prohibiting street parades with shouting and music without the permission of a city officer, but excepting certain organizations from its operation, is unreasonable.⁸⁰ The same objection exists to an ordinance which forbids any person not acting under the orders of a military officer to play any musical instrument in the street on Sunday.⁸¹ But an ordinance forbidding the beating of drums and shouting on the streets without a permit from the mayor was recently held valid.⁸² So a city may prohibit speaking in a public park without such a permit.⁸³ The supreme court of Massachusetts said: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.⁸⁴ If the legislature had power under the constitution to pass a law in the form of the present ordinance, there is no doubt that it could authorize the city of Boston to pass the ordinance, and it is settled by the former decision."

§ 157. Licenses.—The principles which govern the granting of licenses have already been considered. There must be something connected with the business to be licensed which gives rise to the necessity for some degree of supervision. Hence a license may reasonably be required from those who sell milk,⁸⁵ peddle goods from house to house,⁸⁶ sell papers on the street,⁸⁷ sell articles in certain streets,⁸⁸ or engage in certain kinds of busi-

⁸⁰ *State v. Dering*, 84 Wis. 585, 19 L. R. A. 858.

⁸¹ *Johnson v. Mayor of Croydon*, 16 Q. B. D. 708, 7 Eng. Rul. Cas. 278.

⁸² *In re Flaherty*, 105 Cal. 558, 27 L. R. A. 529.

⁸³ *Davis v. Com.*, 167 U. S. 43, 162 Mass. 510, 44 Am. St. 389, 26 L. R. A. 712.

⁸⁴ See *Dill. Mun. Corp.*, §§ 393,

407, 651, 656, 666; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 243, 244, 6 Am. Rep. 70.

⁸⁵ *People v. Mulholland*, 82 N. Y. 324; *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066. See § 52.

⁸⁶ *State Center v. Barenstein*, 66 Iowa, 249.

⁸⁷ *Com. v. Elliott*, 121 Mass. 367.

⁸⁸ *Nightingale, Petitioner*, 11 Pick. 168.

ness, such as butchers⁸⁹ and cattle dealers.⁹⁰ The amount of license fee which can be exacted as a police measure varies according to the nature of the occupation licensed. It must not exceed a sum which is sufficient to reimburse the municipality for the probable trouble and expense of issuing the license and inspecting and regulating the business.⁹¹ Thus, a license fee of \$300 for an auctioneer,⁹² \$25 for a peddler,⁹³ or \$200 for a butcher⁹⁴ has been held unreasonable. But when the amount of the license fee is determined by the state through legislative enactment, its reasonableness cannot be determined by the courts.⁹⁵

§ 158. Discrimination against non-residents.—An ordinance which discriminates against a non-resident by requiring a larger license fee from a non-resident than from a resident is unreasonable and void.⁹⁶ There must be no discrimination between those engaged in the same business or between residents and non-residents.⁹⁷

§ 159. Regulation of markets.—A city may reasonably provide by ordinance that wagons loaded with produce shall not

⁸⁹ *St. Paul v. Colter*, 12 Minn. 41 (Gil. 16).

⁹⁰ *St. Louis v. Knox*, 6 Mo. App. 247. In this case the dealer was required to have a certificate of good moral character.

⁹¹ *North Hudson Co. R. Co. v. Hoboken*, 41 N. J. L. 81. If the amount exacted is unreasonably large in view of the purpose for which it is to be paid, the ordinance is void. *Littlefield v. State*, 42 Neb. 223, 47 Am. St. 697.

⁹² *Mankato v. Fowler*, 32 Minn. 364.

⁹³ *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652.

⁹⁴ *St. Paul v. Colter*, 12 Minn. 41. See *State v. Wheelock*, 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429. For many authorities on the limit of the amount of license fees, see note to *State v. French*, 17 Mont. 54, in 30 L. R. A. 415.

⁹⁵ *State v. Harrington*, 68 Vt. 622, 34 L. R. A. 100.

⁹⁶ *Muhlenbrinck v. Com.*, 44 N. J. L. 365; *State v. City of Orange*, 50 N. J. L. 389, 13 Atl. 240; *Borough of Sayre v. Phillips*, 148 Pa. St. 482, 24 Atl. 76; *State v. Ocean Grove, etc. Ass'n*, 55 N. J. L. 507, 26 Atl. 798. The real objection to these ordinances is not that they are an unreasonable exercise of power, but that they are unconstitutional.

A city may, by ordinance, fix the number of hours which its workmen shall work on the public works; but it cannot make a violation of the ordinance an indictable offense. *State v. McNally*, 48 La. Ann. 1450, 21 So. 27, 36 L. R. A. 533.

⁹⁷ *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Clements v. Town of Casper*, 4 Wyo. 494, 35 Pac. 472.

remain in the market place for more than twenty minutes during certain hours;¹ that persons not licensed occupants of stalls shall not offer meats for sale in less than certain quantities;² or that fresh beef shall not be sold in less than quarters, except between dawn and 9 A. M.³ An ordinance fixing a penalty for each hour that a wagon is kept in a public market is unreasonable.⁴

§ 160. Regulation of liquor traffic.—A municipality may make reasonable regulations with reference to the sale of intoxicating liquors without violating the constitutional right of equal protection and privilege.⁵ Thus, it may limit the districts or precincts of a city in which liquor may be sold.⁶ Drug-gists may be prohibited from selling liquor except for medicinal purposes.⁷ It may provide by ordinance that no license shall be issued to any person until he obtains the consent of two-thirds of the freeholders residing within three miles of his proposed place of business,⁸ or that the granting of a license shall be dependent upon the consent of the county officials.⁹ The reasonableness of an ordinance requiring saloons to close at a certain hour must be determined by the size of the municipality and the character of its population. Ordinances requiring them to close at nine,¹⁰ ten¹¹ and eleven,¹² from 10:30 P. M. to 5 A. M.,¹³ and from midnight to 5 A. M.,¹⁴ have been held reasonable. But an ordinance forbidding licensed retailers to sell between 6 P. M. and 6 A. M. is unreasonable, as it “deprives a party of several hours of daylight in which he is forbidden to exercise a right con-

¹ *Com. v. Brooks*, 109 Mass. 355.

² *St. Louis v. Weber*, 44 Mo. 547.

³ *Bowling Green v. Carson*, 10 Bush (Ky.), 164.

⁴ *Com. v. Wilkins*, 121 Mass. 356.

⁵ *Giozza v. Tiernan*, 148 U. S. 657; *Ex parte Hayes*, 98 Cal. 555, 20 L. R. A. 701; *Decle v. Brown*, 167 Mass. 290, 45 N. E. Rep. 765.

⁶ *In re Wilson*, 32 Minn. 145; *State v. Clark*, 28 N. H. 176. It may limit the license to one for each thousand of the population. *Decle v. Brown*, 167 Mass. 290.

⁷ *Provost City v. Shurtleff*, 4 Utah 15, 5 Pac. 302.

⁸ *Metcalf v. State*, 76 Ga. 208.

⁹ *Wagner v. Town of Garrett*, 118 Ind. 114; *State v. Hellman*, 56 Conn. 190.

¹⁰ *Smith v. Knoxville*, 3 Head (Tenn.), 245.

¹¹ *State v. Washington*, 44 N. J. L. 605; *Ex parte Wolf*, 14 Neb. 24; *Morris v. Rome*, 10 Ga. 532.

¹² *Decker v. Sergeant*, 125 Ind. 404.

¹³ *State v. Welch*, 36 Conn. 215.

¹⁴ *Bright v. Toronto*, 12 U. C. C. P. 433.

ferred by the state."¹⁵ So an ordinance requiring such persons to close their doors and cease selling whenever "any denomination of Christian people are holding divine service" is void.¹⁶ An ordinance which prohibits the employment of women in saloons is a reasonable exercise of the power to regulate such places;¹⁷ but when the constitution provides that no person shall be disqualified by reason of sex from pursuing any lawful occupation, an ordinance forbidding the proprietors of drinking saloons to permit any females to be employed in their places after a certain hour is invalid.¹⁸

§ 161. Fire regulations.—Power to establish fire limits and prohibit the erection of certain kinds of buildings within such limits must be reasonably exercised. Hence an ordinance which absolutely prohibits the altering, repairing or rebuilding of any frame building within certain limits whenever the amount to be expended exceeds \$300 is arbitrary and unreasonable, and practically amounts to the taking of the property without due process of law.¹⁹

§ 162. Quarantine regulations—Second-hand clothing.—The business of dealing in second-hand clothing is a proper one for police regulation.²⁰ In the absence of an epidemic causing an apparent necessity therefor, an ordinance prohibiting any one from bringing second-hand clothing into a town, or exposing it for sale therein, without furnishing proof that it did not come from an infected district, is an unreasonable restraint of trade.²¹

¹⁵ *Ward v. Greenville*, 8 Bax. Ehrenreich, 80 Ala. 579, 60 Am. Rep. (Tenn.), 228. 130; *Weil v. Record*, 24 N. J. Eq.

¹⁶ *Gilham v. Well*, 64 Ga. 192. See 169; *State v. Long Branch*, 42 N. J. State v. Strauss, 49 Md. 288. L. 364, 36 Am. Rep. 518; *State v.*

¹⁷ *Bergman v. Cleveland*, 39 Ohio Segel, 60 Minn. 507; *Marmet v. St. 651*; *State v. Considine*, 16 State, 45 Ohio St. 63. A very clear Wash. 358, 47 Pac. Rep. 755. abuse of the police power must be

¹⁸ *In re M'Guire*, 57 Cal. 604. See shown in order to justify a court Black, Intox. Liq., § 236. in declaring ordinances regulating

¹⁹ *First Nat. Bank v. Sarles*, 129 the business of pawnbrokers, junk- Ind. 201, 28 Am. St. 185. As dealers and dealers in second-hand to the power to establish fire limits goods unreasonable and void. *Grand Rapids v. Braudy*, 105 Mich. 670, 32 see *Kaufmann v. Stein*, 138 Ind. 49, L. R. A. 116.

²⁰ *State v. Taft*, 118 N. C. 1190, ²¹ *Town of Kosciusko v. Stom- 32 L. R. A. 122*; *Greensborough v. berg*, 68 Miss. 469, 9 So. 297.

§ 163. Hotel runners and hackmen.—A city may regulate the conduct of hackmen, hotel runners and porters. An ordinance limiting the number of hackmen who may stand in front of a hotel is reasonable when there are other hack-stands in the city.²² Such persons may be forbidden to solicit business at the depots and railway platforms within the city limits. But a city cannot interfere with the reasonable regulations of the railway companies for the handling of passengers. Thus, an ordinance which forbids hotel runners from going within twenty feet of the train, although permitted to do so by the rules of the company, is invalid.²³

§ 164. Miscellaneous decisions.—An ordinance forbidding smoking in street cars is a reasonable exercise of the power to protect the public health and to suppress nuisances.²⁴ The decisions are in conflict upon the question of the right of the city to require the owners of lots to clean the snow from the sidewalk in front of their premises at their own expense.²⁵ An ordinance requiring all restaurants to close at ten o'clock at night is reasonable under certain conditions.²⁶ An ordinance which requires the keepers of boarding-houses, restaurants and hotels to furnish the city with the names of all persons boarding or lodging at their houses is reasonable.²⁷ A city may require pawnbrokers to furnish the police with a record of all property received and a description of the persons from whom received.²⁸ So it may prohibit pawnbrokers from purchasing the articles upon which they make loans of money.²⁹ An ordinance which requires the proprietors of theaters to pay a police officer two dollars per

²² *Montgomery v. Parker*, 114 Ala. 118, 21 So. 452.

²³ *Napman v. People*, 19 Mich. 352.

²⁴ *State v. Huydenham*, 42 La. Ann. 483, 7 So. 621.

²⁵ In support of the power, see *Goddard's Case*, 16 Pick. 504, 28 Am. Dec. 259. *Contra*, *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. As to the liability of owners for damages for injuries occasioned by failure to remove ice and snow from sidewalk

as required by statute, see *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.

²⁶ *State v. Freeman*, 38 N. H. 426.

²⁷ *Topeka v. Boutwell*, 53 Kan. 20, 27 L. R. A. 593.

²⁸ *Kansas City v. Garnier*, 57 Kan. 412, 46 Pac. Rep. 707. The decisions on the power to regulate the business of pawnbrokers, junk dealers, etc., are collected in a note to *Grand Rapids v. Braudy*, 105 Mich. 670, 32 L. R. A. 116.

²⁹ *Kuhn v. Chicago*, 30 Ill. App. 203.

night for attendance at theaters for the purpose of preserving order is unreasonable and void.⁸⁰ When a city furnishes gas and water to its inhabitants for a compensation it may provide by ordinance that the gas or water may be stopped after ten days' default in the payment of the bill and until the same is paid.⁸¹ An ordinance requiring that garbage shall be removed in water-tight closed carts or wagons, which shall be marked with the word "garbage," is reasonable.⁸² The owner of a lot may be required to remove filth from a private way adjoining his land although he did not place it there.⁸³ An ordinance which prohibits any person from permitting drunkards or disorderly persons to assemble at or remain in his "house, tavern, inn, saloon, cellar, shop, office or other residence or place of business" is unreasonable and void because not limited to places which require police supervision, nor to assemblages of immoral persons.⁸⁴

III. ORDINANCES WHICH PROHIBIT ACTS EXCEPT WITH THE CONSENT OF CERTAIN OFFICIALS.

§ 165. General statement.—Municipalities often enact ordinances which assume to make the legality of an act depend upon the previously obtained consent of a designated official. In the earlier decisions such ordinances were sustained without special reference to this feature. The present tendency, however, is towards treating the provision as an improper delegation of authority, as contravening common right, or as failing to provide uniform and impartial conditions, thus placing it in the power of the official to discriminate between citizens entitled to equal rights before the law. Such ordinances may be roughly thrown into five classes:

1. Those which divide persons into classes without reference to their character or qualifications, placing on one side of the dividing line those who are permitted to pursue their business by the consent of the official, and on the other side those from

⁸⁰ *Waters v. Leach*, 3 Ark. 110.

⁸³ *Com. v. Cutler*, 156 Mass. 52,

⁸¹ *Com. v. Philadelphia*, 132 Pa. St. 238.

29 N. E. 1146.

⁸² *People v. Gordon*, 81 Mich. 306, 45 N. W. 658.

⁸⁴ *Grand Rapids v. Newton*, 111 Mich. 48, 35 L. R. A. 226; *Ex parte Smith*, 135 Mo. 223, 33 L. R. A. 606.

whom that consent is withheld. Such ordinances are almost universally held unconstitutional and invalid.

2. Those in which discretion is granted to public officials to determine the qualifications of applicants for licenses, where the fitness of the applicant is left to the judgment of the officer. Such ordinances are held valid, as they violate no constitutional rights, and require only an administrative determination of facts.

3. Those which prescribe uniform conditions, and authorize some official to determine whether such conditions have been complied with. There can be no objection to ordinances of this kind, as the duties delegated to the officer are of a ministerial character.

4. Those which assume to regulate the doing of lawful acts, and give some officer discretion and power to grant or refuse permission.

5. Those which authorize and empower some officer to authorize or forbid arbitrarily an act illegal under the general terms of the ordinance or the laws of the state.

The two latter classes will be considered in the following sections.

§ 166. Cases sustaining such ordinances.—As above stated, ordinances containing this provision have often been sustained, but generally without the question under consideration being raised.³⁵ In a recent California case³⁶ an ordinance which made it unlawful to beat a drum upon a traveled street without special permission from the president of the board of trustees was held valid. In answer to the contention that the ordinance was oppressive and gave too much power to an officer, the court said: “Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for the purpose of mischief and oppression.” The

³⁵ This is true of *Hine v. New Haven*, 40 Conn. 478; *Nightingale's Petition*, 11 Pick. 168; *Vanderbilt*

v. Adams, 7 Cow. 349; *Pedrick v. Bailey*, 12 Gray, 161. These cases are cited in the recent case of *In re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, but are of little value in support of the proposition contended for.

³⁶ *In re Flaherty*, 105 Cal. 528, 27 L. R. A. 529. See *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923.

same court sustained an ordinance which prohibited the repair or alteration of any wooden building within designated fire limits without written permission of certain officers, on the ground that the provision was necessary in order to avoid the hardships incident to the literal enforcement of the prohibition; and that as no general rule could be established, it was proper to leave the power to the official, who would not "be presumed to exercise it wantonly or for the purpose of profit or oppression."³⁷

Ordinances which require an applicant for a saloon license to obtain the consent of a certain number of voters or residents in the vicinity of his proposed place of business are generally sustained.³⁸ But a city council cannot delegate the power to grant licenses to the mayor.³⁹ Nor can it grant to the mayor the power to determine the district within which licenses may be granted.⁴⁰ But it may authorize him to grant a license when certain prescribed conditions have been complied with.⁴¹

§ 167. Delegation of authority.—Such ordinances are very frequently held invalid as attempts to delegate legislative power. Thus, an ordinance which delegated to the owners of one-half

³⁷ *Ex parte Fiske*, 72 Cal. 125, citing *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703, and distinguishing *Yick Wo v. Hopkins*, 118 U. S. 356. See, also, *Easton Com. v. Covey*, 74 Md. 262; *Com. v. Brooks*, 109 Mass. 355. Where a park board had authority to "govern and regulate the parks" and to "make rules for the government thereof," a rule which forbade "harangues, orations or loud outcries" in a park "except with the prior consent of the board" was held valid in *Com. v. Abraham*, 156 Mass. 57. See § 156, *supra*.

³⁸ *Whitten v. Covington*, 43 Ga. 421; *In re Bickerstaff*, 70 Cal. 35; *House v. State*, 41 Miss. 737; *Groesch v. State*, 42 Ind. 547; *State v. Brown*, 19 Fla. 563; *Jones v. Hilliard*, 69 Ala. 300. But *in re Chris-*

tensen, 43 Fed. 243, an ordinance which required the applicant to obtain the consent of a majority of the board of police commissioners or of not less than twelve citizens owning real estate in the block, was held invalid on the ground that it left to the persons named the power to control the liquor traffic, and as vesting in them arbitrary discretion. See, also, *Quong Woo*, 18 Fed. 229.

³⁹ *Kinmundy v. Mahan*, 72 Ill. 462; *State v. Bayonne*, 44 N. J. L. 114; *Trenton v. Clayton*, 50 Mo. App. 541.

⁴⁰ *State v. Kantler*, 33 Minn. 69; *In re Wilson*, 32 Minn. 145.

⁴¹ *Swarth v. People*, 109 Ill. 621; *Bradley v. Rochester*, 54 Hun (N. Y.), 140; *In re White*, 43 Minn. 250.

the ground in any block the power to determine whether a livery-stable should be erected therein was held invalid.⁴²

§ 168. Nature of prohibited act.—The validity of such an ordinance is sometimes made to turn upon the nature of the act prohibited thereby. If it is an act which no citizen has the inherent right to do, and which the municipality may absolutely prohibit, it may grant the privilege under such conditions as it sees proper. In considering a town order which prohibited the keeping of swine “without a permit in writing first obtained from the board of health,” Mr. Justice Holmes said: “We are at a loss to see how it affects the validity of the order that the board expressly reserved to themselves a power to do what they could have done even if the prohibition had been absolute; or how the defendants are put in a worse position by the order contemplating the possibility that the board of health may grant them a written permit than if it had excluded that possibility.”⁴³ But when the act can only be regulated the conditions imposed must be general and uniform, and this principle is violated by an ordinance which makes the exercise of the right subject to the arbitrary discretion of any person.⁴⁴

⁴² *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, note. This principle will be found discussed in many of the cases cited under this general subject. *Vide* *Anderson v. Wellington* and *In re Frazee*, *supra*. *Contra*, *Chicago v. Stratton*, 162 Ill. 494, 35 L. R. A. 84. This case contains a discussion of the question of the validity of laws which are made dependent upon a contingency, and cites *Locke's Appeal*, 72 Pa. St. 491; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793.

⁴³ *Inhabitants of Quincy v. Kenard*, 151 Mass. 563; *In re Flaherty*, 105 Cal. 558; *Ex parte Tuttle*, 91 Cal. 589; *In re Guerrero*, 69 Cal. 88. It is upon this theory that ordinances providing that the issuing of liquor licenses shall depend upon obtaining the consent of certain officials are sustained. *Ex parte*

Christensen, 85 Cal. 208, 24 Pac. 747.

⁴⁴ *In re Frazee*, 63 Mich. 369; *State v. Dering*, 84 Wis. 585, 19 L. R. A. 858; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110. In *State v. Dering*, *supra*, the court said: “It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the law and the enjoyment of their undoubted rights. In the exercise of the police power the common council may in its discretion regulate the exercise of such rights in a reasonable manner, but cannot suppress them directly or indirectly, by attempting to submit the power of doing so to the mayor or any other

§ 169. Uniform conditions—Unjust discrimination.—Although ordinances of this kind are generally said to be unreasonable, the real objection is that they are unconstitutional because in violation of the fourteenth amendment to the constitution of the United States, which prohibits the enactment of any law which abridges the privileges or immunities of citizens or denies to any person the equal protection of the laws.⁴⁵ If the conditions upon which the consent of the official is to be given are determined and are uniform and applicable to all citizens, the ordinance is valid; but if its enforcement rests in the uncontrolled discretion of any officer or city council, it is invalid.⁴⁶ Thus, an ordinance that provides that no one shall maintain a market within certain limits without the permission of the city council is invalid because the discretion is in no way regulated or controlled, and no conditions are prescribed upon which permission shall be granted.⁴⁷ So an ordinance which provides that it shall be unlawful for any person or persons, club or association of any kind to parade the streets of the city with any flag or flags, banners, transparencies, drums, horns or other musical instruments without first having procured permission of the city council so to do is an encroachment upon the constitutional rights of citizens.⁴⁸ So an ordinance which makes it unlawful for any person to parade the streets of the city shouting, singing and

officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it, or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant. Such ordinances or regulations to be valid must have an equal and uniform application to all persons, societies or organizations similarly circumstanced, and not be susceptible of unjust discriminations, which may be arbitrarily practiced to the hurt, prejudice or annoyance of any." *City of St. Paul v. Lawton*, 61 Minn. 537; *State v. McMahon*, 69 Minn. 265, 72 N. W. 79. (Requirement that a "permit" shall be obtained before re-

moving contents of privy vault.) This provision does not give "any arbitrary discretion by which to withhold a permit from a suitable person properly equipped to do the work."

⁴⁵ *State v. Dering*, 84 Wis. 585, 19 L. R. A. 858. This equal protection of the laws is a pledge of the "protection of equal laws." *Yick Wo v. Hopkins*, 113 U. S. 369.

⁴⁶ *In re Frazee*, 63 Mich. 396; *Chicago v. Trotter*, 136 Ill. 430.

⁴⁷ *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; followed in *State v. Deffes*, 45 La. Ann. 658, 12 So. 841.

⁴⁸ *Rich v. City of Naperville*, 42 Ill. App. 222.

beating drums or other musical instruments, or doing any other act designed or calculated to attract an unusual crowd, without the written consent of the mayor, is invalid because not fixing uniform and impartial conditions and because improperly delegating power.⁴⁹ Where an ordinance prohibited dairies within certain designated limits without the consent of the city council, the court said:⁵⁰ "The discretion vested in the city council by the ordinance is in no way regulated or controlled. There are no conditions prescribed upon which permission may be granted. It is within the power of the city council to grant the privilege to some and deny it to others. The discretion vested in the council is purely arbitrary and may be exercised in the interest of the favored few. It may be controlled by partisan considerations, race prejudices or personal animosities. It lays down no rules by which its impartial execution can be secured."

⁴⁹ *Anderson v. City of Wellington*, 40 Kan. 173, 2 L. R. A. 110.

⁵⁰ *State v. Mahner*, 48 La. Ann. 496, 9 So. 840.

CHAPTER XV.

GOVERNING BODIES, OFFICES AND AGENTS.

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§ 170. **Distribution of powers.**—The nature of a corporation is such that it must necessarily exercise its powers through some representative or agent. Under the town-meeting system there must be administrative and executive officers to carry into effect the expressed will of the general body. Under the representative system the city council and various officers act as the agents of the corporation. In a wide sense the council represents the corporation; early charters incorporated the mayor and the members of the council instead of the people of a particular locality. The distribution of powers and duties among the various boards and officers is made by the charter of a corporation. It also determines the constitution of the council and the manner of its organization. In some cities large powers are vested in boards which act under the general supervision of the council. These

boards, however, are often distinct public corporations charged with a portion of local administration, and possessed of the power to pass by-laws which have the effect of municipal ordinances. Thus, the public schools, the park system and the general subject of the public health are commonly placed under the control of subordinate or independent corporations known as school boards, park boards and boards of health.

§ 171. The corporate meeting.—The affairs of a corporation must be transacted at a meeting of the corporate body.¹ Under the town-meeting system this means a meeting of the qualified inhabitants of the corporation. But the business of the ordinary municipal corporation is transacted by a select or representative body called a council. Its members are elected by the qualified electors of the corporation at an election duly called for that purpose. Under this system the electors have no power except when specially given by statute to bind the corporation at a public election or general meeting. They can act only through their legally constituted representatives. The composition of these representative or corporate meetings is generally provided for by statute. At common law a valid meeting required the presence of the mayor or other head officer, a majority of the members of each select or definite class, and some members of the indefinite body usually called the commonalty, or of each of the indefinite classes if there were more than one. If there was no indefinite class and the governing body consisted of a select class or of more than one select class, a majority of each select class must be present.

§ 172. Notice of corporate meetings.—Where the time and place of regular meetings are fixed by charter or by a valid ordinance, it is not necessary that special notice thereof be given members to enable the body to transact ordinary and prescribed business. If, however, it is intended to transact special business, or if a meeting is to be held at any other time or place, it is necessary that special notice be served upon each member, desig-

¹ *Dey v. Jersey City*, 19 N. J. Eq. 412. In vol. 7, Eng. Rul. Cas. 837, the rule is thus stated: "At common law, and in the absence of special contract, the acts of a corporation are those of a duly-constituted

meeting, to which (unless there is a fixed time of meeting) all the corporators must be summoned, and if the corporation consists of a definite number the major part must attend."

nating the time, and the place if other than the regular place of meeting, and the general character of the business to be transacted.² The notice must be given by some one having authority to call the meeting. Generally, however, notice is waived by the presence and consent or acquiescence of every one entitled to receive the notice.³

Charter provisions with reference to notice of meeting must of course govern in all cases. Such provisions with reference to the calling of town meetings are strictly construed. Thus, it is intimated in respect to New England towns, that notice is a legal condition precedent to a valid meeting, and that a *de facto* meeting not duly warned or notified is invalid, although all who are entitled to notice attend.⁴ Such notice must be sufficient to fairly indicate the object of the meeting and the nature of the business to be transacted, and the body cannot transact at the meeting any other special business than that stated in the notice.

A notice which states that certain business will be considered and "any other business then thought proper by said meeting" does not admit of the transaction of any other business than that specifically stated.⁵

§ 173. The common council.—The common council is the most important of the agencies through which municipal corporations act. It exercises legislative power and controls the general policy of the municipality.⁶ Its constitution, its powers, meetings and procedure are ordinarily determined by the city charter. It can act only as a body, at a regularly called meeting.⁷ Under one form of organization the council has extensive administrative power, makes contracts, appoints officials, and is the general administrative as well as governing body. Under another form its duties are purely legislative, and the work of administration is

² *Shugars v. Hamilton*, 29 Ky. Law, 127, 92 S. W. 564.

³ *Lord v. Anoka*, 36 Minn. 176. But the mere attendance of and waiver by a quorum is not sufficient. Every member has a right to be notified. *Beaver Creek v. Hastings*, 52 Mich. 528.

⁴ *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 130; *Sherwin v. Bugbee*, 17 Vt. 337; *Hayward v.*

School District, 2 Cush. (Mass.) 419; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99.

⁵ *Hayden v. Noyes*, 5 Conn. 391.

⁶ *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.), 106, 116, note.

⁷ *Dey v. Jersey City*, 19 N. J. Eq. 412. As to the manner in which a board of police must act, see *Baltimore v. Poultney*, 25 Md. 18.

largely left to officers elected by the people for that purpose. The common form is a single body with a membership determined by the charter and elected by the people from defined districts within the municipality. The mayor is sometimes the presiding officer of the council; but more commonly the council elects its own officers.⁸ The right of the mayor under a charter provision to preside over the council is a right to a public office which may be tested by *quo warranto* but not by a bill in chancery to enjoin.⁹ When legislative power is vested in the "mayor and aldermen" the council cannot legislate without the mayor. Under the early English system the mayor was an integral part of the council and no business could be transacted in his absence. Hence all business could be stopped by the wrongful withdrawal of one of the constituent parts of the body.¹⁰ But this rule has no application to public corporations in this country.¹¹ The mayor cannot adjourn a council beyond a time at which the law requires a certain city official to be elected.¹²

§ 174. Place of meetings.—The validity of corporate acts or the action of municipal officials may depend upon whether the action was taken at the place designated by the statute. Thus, a law requiring boards of supervisors to meet "at the court-house" was not complied with by a meeting held in a building near the court-house, which opened into the court-house inclosure and was used as an office by the clerk and sheriff.¹³ A statute requiring a town meeting to be held in the "school-house" means within the walls of the school-house.¹⁴

§ 175. Quorum and majority.—A quorum is "the number of members of any constituted body of persons whose presence

⁸ *State v. Kilchli*, 53 Minn. 147, 19 L. R. A. 779. Power of legislative assembly to remove speaker, see *In re Speakership*, 15 Colo. 500, 11 L. R. A. 240.

⁹ *Cochran v. McCleary*, 22 Iowa, 75 (Dillon, J.); *In re Sawyer*, 124 U. S. 200 (Gray, J., citing many cases).

¹⁰ *King v. Williams*, 2 Maule & Sel. 141.

¹¹ *Martindale v. Palmer*, 52 Ind. 411; *Kimball v. Marshall*, 44 N. H. 465.

¹² *Tillman v. Otter*, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110.

¹³ *Harris v. State*, 72 Miss. 960, 33 L. R. A. 85. See *Shugars v. Hamilton*, 29 Ky. Law, 127.

¹⁴ *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517. For further illustrations, see *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440; *Moody v. Moeller*, 72 Tex. 635; *Marion Co. Com'rs v. Barker*, 25 Kan. 258, and cases cited in note to *Harris v. State*, 33 L. R. A. 85.

at or participation in a meeting is required to render its proceedings valid or to enable it to transact business legally.”¹⁵ The number required is usually fixed by special provision.

In the absence of special provision, the nature of the body or assembly is material in determining what number is a quorum. In indefinite bodies—bodies whose numbers are unfixed and changing, such as the electorate at large or the inhabitants of a town—there is no implied or common law requirement that a particular number shall attend. If the election or the meeting has been properly notified, any number present may do business by majority or plurality vote, as the case may be.¹⁶ And a majority of such a body sufficient to carry an act is a majority of those voting; any members present who do not vote are deemed to acquiesce in the action of the others.¹⁷

Among select bodies of a definite number, wielding power in a fiduciary capacity—such as city councils, boards and committees—there is, in the absence of express statutory provision, an implied or common law rule which requires that a majority of the body be present to enable business to be done; though a number less than a majority, if properly met, may adjourn till another date.¹⁸

Furthermore, the body has no power to alter the number, even though, as in the case of a city council, it is empowered to adopt rules of procedure.¹⁹ To carry a measure in such bodies it is not necessary that a majority of all the members elected vote in favor thereof; a majority of those present is sufficient, even though there be only a bare quorum and as a result a minority of the entire body is permitted to bind the whole. Thus, if a council consists of twelve members, seven are a quorum, and that num-

¹⁵ Century Dictionary, “Quorum.”

¹⁶ State v. Binder, 38 Mo. 450; see note to Lawrence v. Ingersoll, 6 L. R. A. 309.

¹⁷ State v. Binder, *supra*. The words “a majority of such electors” in a constitutional provision authorizing a vote of the electorate upon proposals to change county seats, mean a majority of those voting at the election. Everett v. Smith, 22 Minn. 53.

¹⁸ United States v. Ballin, 144 U. S. 1; *Ex parte* Willcocks, 7 Com. 402; Damon v. Granby, 2 Pick. 345; Barnett v. Paterson, 48 N. J. L. 395, 6 Atl. 15; Heiskell v. Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308; Cushing, Legislative Assemblies, § 247.

¹⁹ Heiskell v. Baltimore, 65 Md. 125, 57 Am. Rep. 308, 4 Atl. 116; see, also, Zeller v. Central R. Co., 84 Md. 304, 34 L. R. A. 469.

ber being present four votes for or against a measure will conclude the council.²⁰

Some confusion and conflict have arisen on the question whether, when some members present in a meeting of a select body refrain from voting, the majority whose vote in favor of a measure will carry it is a majority of the number which will constitute a quorum, or a majority of the number present. By some decisions a majority of a quorum is sufficient, on the ground that those who do not vote must be taken to acquiesce in the action of those who do.²¹ By other decisions a majority of those present must concur, on the ground that those who will not favor a measure must be taken to oppose it.²² And this is indirectly the effect of a decision that where a council consists of eight members and the mayor has a casting vote in case of a tie, if four vote in the affirmative and four refuse to vote the mayor may cast a deciding ballot.²³

Authority to remove an officer by a two-thirds vote "of the council," has been held to mean a two-thirds vote of those present at a valid meeting.²⁴

²⁰ 5 Dane's Abr. 150; Buell v. Buckingham, 16 Ia. 284; Brown v. District of Columbia, 127 U. S. 579.

²¹ State v. Green, 37 Oh. St. 227; Rushville Gas Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315. In this case the court said: "The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members."

The case was followed in State v. Dillon, 125 Ind. 65, 25 N. E. 136. In Attorney General v. Shepard, 62 N. H. 388, it was held that a

majority of the votes cast is sufficient in a board of aldermen.

²² Lawrence v. Ingersoll, 88 Tenn. 52, 6 L. R. A. 309; Barnett v. Paterson, 48 N. J. L. 395; 1 Dillon, Municipal Corporations (4th ed.), §§ 278, 279, 282. The court in Rushville Gas Co. v. Rushville, *supra*, seems to have misunderstood Judge Dillon's text. In the fourth edition at page 369, that learned author, after noting the decision and stating the rule adopted by the court, says: "It deserves further consideration whether this result is consistent with the majority rule applicable to definite bodies." His text in § 282 seems to be contrary to the court's conclusion.

²³ Launtz v. People, 113 Ill. 137, 55 Am. Rep. 405.

²⁴ Warnock v. La Fayette, 4 La. Ann. 419.

§ 176. **Motives of members.**—The courts have no power to inquire into the motives of members of the legislature which enacted a law.²⁵ This principle applies as well to a city council as to a state legislature.²⁶ But notwithstanding this the courts will not sustain an ordinance the enactment of which was procured by fraud and bribery.²⁷ As said by Judge Dillon:²⁸ “It would be disastrous to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, *may be impeached for fraud* at the instance of persons injured thereby.”

§ 177. **Interest of members.**—A general principle similar to that which invalidates a transaction by an agent or a trustee in which he has an interest adverse to his principal or *cestui que trust*, applies to public officers in general,²⁹ and therefore to members of a board or council while exercising official discretion on behalf of the public or of a public corporation; and invalidates any affirmative action by such a body which rests upon the concurrence of a member who is adversely interested in the matter concerned. Thus, where the legislature permitted a board of three trustees of a city to select and convey public lands to a railroad company as a donation, and one member was opposed to any grant, a deed executed by the other two was held invalid upon proof that one of the two was a shareholder and director

²⁵ Cooley, Const. Lim. (7th ed.), § 257; Wright v. Defrees, 8 Ind. 298.

²⁶ Buell v. Ball, 20 Iowa, 282; Freeport v. Marks, 59 Pa. St. 253.

²⁷ State v. Cin. Gas Co., 18 Ohio St. 262.

²⁸ Dillon, Mun. Corp. (4th ed.), I, § 311.

²⁹ *Infra*, § 183; Scott v. School Dist. 67 Vt. 150, 31 Atl. 145; Findlay v. Pertz, 66 Fed. 427. “But the principal may elect to take the benefit of the contract notwith-

standing the fraud, and in such case the third party will be bound. And this is so even if the principal be a public corporation, as a city, since the contract is neither *malum in se* nor *malum prohibitum*, but one which the city might have made. And after such election it may sue the third party for fraud, and the agent for money had and received to its use.” Huffcut, Agency, 148; citing Findlay v. Pertz, *supra*; Mayor v. Lever, 1891, 12 B, 168.

of the railroad company.⁸⁰ By the weight of authority, the action is valid, however, if a majority or other requisite number participate in the affirmative vote exclusive of all interested members, provided that no actual fraud or improper influence is shown.⁸¹ Slight evidence of fraud or collusion will suffice to overturn the transaction.

But many courts have adopted a much stricter doctrine than this; namely, that no transaction or vote is valid if any member is interested adversely to the corporation in favor of accomplishing it. It is said that the influence and interest of such a member must necessarily affect the others, and further that the corporation or the public is entitled to the disinterested counsel and judgment of all.⁸²

⁸⁰ *San Diego v. San Diego, etc. R. Co.*, 44 Cal. 106; *Rider v. Portsmouth*, 67 N. H. 298, 38 Atl. 385; *McFarland v. Gordon*, 70 Vt. 455, 41 Atl. 507. Many states have statutory provisions, some imposing a criminal penalty, which confirm this rule, or state a similar one.

⁸¹ *Junkins v. School District*, 39 Me. 220; *Tucker v. Howard*, 122 Mass. 529.

⁸² *People v. Township Bd.*, 11 Mich. 222; (but see *Niles v. Muzzy*, 33 Mich. 61); *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Pickett v. School District*, 25 Wis. 551; *Pratt v. Luther*, 45 Ind. 250; *Fort Wayne v. Rosenthal*, 75 Ind. 157; *Mayor v. Huff*, 60 Ga. 221. In *People v. Township Bd.*, *supra*, *Christiancy, J.*, said:

"The fact that those contractors did not constitute a majority of the joint boards of the several townships * * * I do not regard as in any respect altering the principle; nor the fact that the contract was let to the lowest bidder. The price alone is but one element embraced in the question, and even this might be affected by their influence, by fixing the time and

place of the letting, by their right to decide upon the responsibility of the bidders, and by many other circumstances, over which, as members of the board, they might exercise an influence. But, the plan of the work, the materials to be used, and the mode and time of completion, might all be influenced by the individual interests of these men, and determined, in a way which would effectually exclude a fair competition in bidding. And, they would, of course, have a voice in determining upon the mode in which the work was afterwards done under the contract, and its acceptance. In all these matters, the influence of these contractors would not only be given by their own votes, but, as all the members must be supposed to be more or less influenced by them, though but a minority, they may determine the majority; and, it is manifestly impossible, from the nature of the case, to ascertain and measure the amount of their influence upon the board, or in what manner it may have affected the action of the other members, or what would have been the determination

The interest which will disqualify a member from taking part in the proceedings or will render the transaction invalid is an opposing pecuniary interest directly in the matter itself. Thus, the indirect benefit to a member as a property owner from a particular public improvement will not affect a vote in favor thereof.³³

There is some diversity of judicial opinion as to whether the value of services rendered, or property furnished, under a contract which is void on the above principle, can be recovered as upon a *quantum meruit*.³⁴

§ 178. Control by the courts.—The acts of a municipal council or board, like those of other governmental agencies, are subject to review by the courts for irregularity and for excess of power. Where a discretion has been lodged in a council or board, a court must not substitute its judgment for that of the officers in whom the discretion is vested. But the rule is limited by the restriction that the discretion must be exercised within its proper limits for the purposes for which it is given.³⁵ An exercise of the authority may be so unreasonable as to be deemed to be outside of the intent of the authorizing statute. Thus, where power is given to a board of supervisors to fix water rates, it is intended that the rate of compensation fixed shall be reasonable and just, and if the rates are fixed so low as to amount to practical confiscation of the property of the water company the court will provide a remedy.³⁶ A court of equity will not interfere or revise the discretion and judgment of a common council as to the place and manner of the erection of a public building.³⁷ Such questions necessarily require the exercise of discretion and

of the majority without that influence; the members themselves could neither state nor know it.

And, though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet if they have acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection."

³³ Steckert v. E. Saginaw, 22 Mich. 104; Coles v. Williamsburg, 10 Wend. 659; Topeka v. Huntoon,

46 Kas. 634; Goff v. Nolan, 10 How. Pr. 323; Dorchester v. Youngman, 60 N. H. 385.

³⁴ See Concordia v. Hagaman, 1 Kas. App. 35, and cases cited; Mayor v. Huff, 60 Ga. 221.

³⁵ Davis v. Mayor of New York, 1 Duer, 451; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536.

³⁶ Spring Valley W. W. v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 16 Am. St. 116.

³⁷ Kendall v. Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. 118.

judgment by the council. Where a board of aldermen is made the sole judge of the qualification, election and return of its own members, its decision, if made regularly, is not subject to revision by the courts.³⁸

Where a judgment or discretion of a *quasi-judicial* nature is vested in a council or board, the writ of *certiorari* lies for a judicial review of the questions of jurisdiction and regularity of action. *Mandamus* also may be issued against such a body to compel performance of any ministerial duty. If a council refuses to obey a *mandamus* ordering the payment of a claim, those members who voted against such payment may be punished for contempt of court.³⁹

§ 179. Who are officers.—“A public office is a permanent trust to be exercised in behalf of the government or all citizens who may need the intervention of a public functionary or officer. It means the right to exercise generally, and in all proper cases, the function of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law.” The incumbent of such an office is a public officer.⁴⁰ But as a general rule it is essential to the nature of a public office that the duties be in a sense continuous, and be prescribed by law, rather than by contract or by a superior officer. File clerks, janitors, officers of justice courts and the like, are mere employees, and the courts will not determine their rights in *quo*

³⁸ Linegar v. Rittenhouse, 94 Ill. 208; State v. Marlowe, 15 Ohio St. 114; Mayor v. Morgan, 7 Mart. (N. S.) 1, 18 Am. Dec. 282. Some decisions have held that, where a body is given authority to judge of the election and qualifications of a member, a court has a concurrent jurisdiction to decide the question, unless the authority of the body itself is expressly made exclusive. State v. Gates, 35 Minn. 385, 28 N. W. 927; Com. v. Allen, 70 Pa. St. 465; State v. Kempf, 69 Wis. 470, 34 N. W. 226, 2 Am. St. 753.

³⁹ State v. Judge, 38 La. Ann. 43, 58 Am. St. 158; Board of Com. v. Sellev, 99 U. S. 624.

⁴⁰ Henley v. Lyme, 5 Bing. 91; Ogden v. Raymond, 22 Conn. 379, 59 Am. Dec. 429. Many definitions and authorities are cited in State v. Spaulding, 102 Ia. 639, 72 N. W. 288. See, also, many cases cited in note to McCornick v. Pratt, 8 Utah, 294, in 17 L. R. A. 243. See, also, State v. Kilchli, 53 Minn. 147; State v. Dillon, 32 Fla. 545, 22 L. R. A. 124; State v. Anderson, 45 Ohio St. 196, 12 N. E. 656.

warranto proceedings.⁴¹ Commissioners appointed to refund the bonded indebtedness of a township are mere financial agents and not public officers.⁴² The president of a city council is not necessarily "an officer of the city," within the meaning of a statute but may be only an officer or servant of the council that selected him.⁴³ The members of the detective department of the district police force are public officers and not mere employees.⁴⁴ But the question whether a certain person is a public officer or merely an employee must in many cases be determined from an examination of the statute providing for the office and prescribing its duties.⁴⁵

The distinction between state and municipal officers will be elsewhere considered.⁴⁶ The question often arises under the provisions of law which forbid one person holding more than one office, a state and municipal office, a state and federal office, or under the common law which forbids one person from holding inconsistent offices.

§ 180. Election and appointment.—The manner in which the officers of public corporations are to be elected or appointed is always provided in the charter or general law, or in the ordinance when the office is governed by ordinance. The members of a city council are always elected by the people, and this is generally true of the mayor. The treasurer, comptroller, attorney and members of boards are sometimes elected by the people and sometimes by the council. Subordinate officers are generally either appointed by the mayor and confirmed by the council, or elected by the council. The power to appoint to office is not an inherent executive function.⁴⁷ The transfer from a council to the mayor "of all executive power now vested by law in the city

⁴¹ *Trainor v. Board of Auditors*, 89 Mich. 162, 15 L. R. A. 95.

⁴² *Travelers' Ins. Co. v. Oswego*, 59 Fed. Rep. 58, 7 C. C. A. 69.

⁴³ *State v. Klichl*, 53 Minn. 147, 54 N. W. 1069.

⁴⁴ *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 33 L. R. A. 253.

⁴⁵ (Foreman of yard in health department) *Garvey v. Lowell*, 199 Mass. 47; (physician in penal institution) *Marshall v. Ill. State Reformatory*, 201 Ill. 9; (professor

in a state university) *Head v. Curators*, 47 Mo. 220. See also *Carrington v. United States*, 208 U. S. 1; *People v. Cahill*, 188 N. Y. 489.

⁴⁶ § 259, *et seq.*

⁴⁷ *Fox v. McDonald*, 101 Ala. 51, 13 So. 416, 46 Am. St. 98, 21 L. R. A. 529; *State v. Boucher*, 3 N. Dak. 389, 21 L. R. A. 539; *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. 122, and note on p. 127.

council or in either branch thereof" authorizes the mayor to appoint a superintendent of buildings.⁴⁸ When the power of appointment is vested in the mayor there is no implied requirement of confirmation by the council.⁴⁹ After having confirmed an appointment the council cannot reconsider its action and refuse to confirm.⁵⁰ A council the term of whose life is one year may create and appoint to an office the term of which exceeds one year.⁵¹

§ 181. Qualifications.—The qualifications necessary to the holding of an office are determined by the constitution or by the statutes of the state, and the possession of such qualifications is as essential to the right to hold the office as is appointment or election.⁵² An alien cannot hold an office;⁵³ but a non-resident is eligible to office unless the contrary is provided by statute.⁵⁴ As a general rule it is held that women are ineligible to office unless the right is expressly conferred upon them.⁵⁵ The tendency, however, is to confer the right in certain cases; and, under certain constitutions which are silent upon the subject, the general right has been admitted.⁵⁶ Reasonable property qualifications may be required by statute in the absence of constitutional restriction.⁵⁷ When the qualifications are fixed by the constitution, the legislature cannot impose others as a condition to the holding of office.⁵⁸ Qualifications prescribed by statute must concern the fitness of the candidate or be calculated to accomplish some legitimate public purpose; for otherwise they will operate as an unconstitutional discrimination. A statute requiring members of a police commission to be members of the

⁴⁸ *Attorney-General v. Varnum*, 167 Mass. 477, 46 N. E. 1.

⁴⁹ *State v. Doherty*, 16 Wash. 382, 47 Pac. 958.

⁵⁰ *State v. Wadham*, 64 Minn. 318, 67 N. W. 64. Power to appoint court-house and city hall commissioners, see *State v. Ermentrout*, 63 Minn. 105, 65 N. W. 251.

⁵¹ *State v. Anderson*, 58 N. J. L. 515, 33 Atl. 846.

⁵² *Nanson v. Grizzard*, 96 N. O. 293.

⁵³ *State v. Smith*, 14 Wis. 497.

⁵⁴ *Com. v. Jones*, 12 Pa. St. 365;

State v. George, 23 Fla. 585; *State v. Swearingen*, 12 Ga. 23. But see *contra* *Barre v. Greenwich*, 1 Pick. 129.

⁵⁵ *Bradwell v. Illinois*, 16 Wall. 130; *Robinson's Case*, 131 Mass. 376; *Hough v. Cook*, 44 Iowa, 639; *State v. Gorton*, 33 Minn. 345.

⁵⁶ *Jeffries v. Harrington*, 11 Colo. 191.

⁵⁷ *Darrow v. People*, 8 Colo. 417.

⁵⁸ *McCrary, Elections*, § 312; *Barker v. People*, 3 Cowan (N. Y.), 685, 15 Am. Dec. 222.

party having the highest or next highest representation in the common council was held unconstitutional.⁵⁹ But a statute which provided that members of a police board should be appointed from the members of the two largest political parties of the city was held constitutional.⁶⁰ A statute assuming to grant special privileges to freeholders in addition to those granted by the constitution is class legislation and void.⁶¹ A number of statutes have been enacted which provide that veterans shall be given the preference over other citizens in the matter of appointment to office. Such statutes are probably valid when applied to mere employes, and invalid when applied to public officers.⁶²

⁵⁹ Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 403.

⁶⁰ Comm. v. Plaisted, 148 Mass. 375.

⁶¹ State v. Goodville, 30 W. Va. 179, 6 L. R. A. 621. In support of the proposition that the legislature cannot impose upon voters other qualifications than those fixed by the constitution, see Kansas City v. Whipple, 136 Mo. 475, 38 S. W. 295, 35 L. R. A. 746; Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42; State v. Dillon, 82 Fla. 454, 22 L. R. A. 124; Buckner v. Gordon, 81 Ky. 665; Short v. Maryland, 80 Md. 392.

⁶² Sullivan v. Gilroy, 55 Hun (N. Y.), 285; People v. French, 52 Hun (N. Y.), 464; Opinion of Justices, 145 Mass. 587; State v. Delaney (N. J., 1893), 25 Atl. 946. In Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 33 L. R. A. 253, the court said: "Can the legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impar-

tial and competent officer or board charged with some public duty in making the appointments? If such legislation is not constitutional as regards public offices, the question incidentally may arise whether a distinction can be made between public offices, and employments by the public which are not offices. Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good and not the profit, honor or private interest of any man, family or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare." It was held that the members of the police force were public officers and that the act was unconstitutional. See State v. Miller, 66 Minn. 90, 68 N. W. 732 (preference to veterans on public works). In State v. Barrows, 71 Minn. 178, 37 N. W. Rep. 704, such a statute was construed, but its constitutionality was not questioned. See note to Louisville, etc. Co. v. N. R. Co., 14 L. R. A. 579, for cases on equality of privileges, etc.

§ 182. Conditions precedent to entering upon an office.—An office must be accepted, but no particular form of acceptance is necessary. The mere entering upon the office is sufficient.⁶³ At common law it was an indictable offense to refuse to accept an office, but for obvious reasons this rule has become of little importance.⁶⁴ When the taking of an oath is made a condition precedent to admission to an office the officer possesses no rights until this requirement is complied with.⁶⁵ But a failure to take the oath within the time fixed by law does not *ipso facto* create a vacancy. He may take the oath at any time before any steps are taken to have a vacancy declared.⁶⁶ The form of oath is ordinarily prescribed, and must be substantially followed.⁶⁷ The filing of a bond with sufficient sureties is almost universally made a condition precedent to the right to enter upon an office which requires the care and custody of money or property. Unless the statute makes the filing of a bond within a designated time a condition precedent to the right to the office, the failure to file within such time will not work a forfeiture of the right or create a vacancy. In such case the officer may file his bond after he has entered upon the duties of the office.⁶⁸

In some states it is held that one who can qualify at the time when called upon to assume the duties of an office is eligible to the office although he was under some disability on the day of election. This, on the theory that "it is an eligible officer the law requires, and any person who can qualify himself to take and hold the office is eligible at the time of the election."⁶⁹ This rule is adopted by congress with reference to the qualifications

⁶³ Smith v. Moore, 90 Ind. 294.

⁶⁴ See Hinze v. People, 92 Ill. 406.

⁶⁵ People v. McKinney, 52 N. Y. 374.

⁶⁶ State v. Ruff, 4 Wash. 234, 16 L. R. A. 140.

⁶⁷ Davis v. Berger, 54 Mich. 692; Olney v. Pierce, 1 R. I. 292; State v. Trenton, 35 N. J. L. 485.

⁶⁸ Knox Co. v. Johnson, 124 Ind. 145, 7 L. R. A. 684, and cases cited in decision; Launtz v. People, 113 Ill. 137. Many authorities are reviewed and cited in Holt Co. v.

Scott, 53 Neb. 176, 73 N. W. 681.

See, also, note to Com. v. Johnson, 19 Am. St. 96. As to the right of a comptroller to refuse to approve the bond of an officer, see State v. Shannon, 132 Mo. 139.

⁶⁹ State v. Van Beek, 87 Iowa, 569, 19 L. R. A. 622; State v. Smith, 14 Wis. 497; State v. Trumpf, 50 Wis. 103; Privet v. Bickford, 26 Kan. 53, 40 Am. Rep. 801; State v. Murray, 29 Wis. 96, 9 Am. Rep. 489; Vogel v. State, 107 Ind. 374.

of its members.⁷⁰ But the stronger reasons appear to be with the courts which hold that the person must be eligible at the time of his election as well as at the time of entering upon the office.⁷¹ When the constitution imposes a disability upon a member of the legislature "during the time for which he is elected" to hold any office, the disability continues until the expiration of the full period for which he was elected, notwithstanding his resignation as a member of the legislature.⁷²

§ 183. Fiduciary position of public officers.—A public officer stands in a relation of trust and confidence. His position

⁷⁰ Cushing, *Law and Prac. Leg. Ass.*, p. 79; McCrary, *Elections*, § 311.

⁷¹ *State v. Williams*, 99 Mo. 291, 12 S. W. 905; *Taylor v. Sullivan*, 45 Minn. 309, 11 L. R. A. 272. In *State v. Moores*, 52 Neb. 770, 73 N. W. 299, it was held that the word "eligible" relates to the capacity to be elected or chosen to an office as well as to hold the office. The court said: "To hold that the disqualification has reference alone to the time of assuming the duties of public office is to disregard the etymology of the word 'eligible.' The definition given it in the *Standard Dictionary* is: 'Capable of being chosen; qualified for selection or election; fit for or worthy of choice or adoption.' The word is similarly defined in the *Century* and other dictionaries. The term 'eligible,' as employed in the constitution, should be given its plain and ordinary signification; and, when so construed, there is no escaping the conclusion that it means capable of being elected or chosen. Neither the framers of the constitution, nor the people in adopting it, intended to permit a person to be elected to a public office who at the time was disqualified from entering upon the duties

thereof, and run the risk of the removal of the disability between the day of election and the commencement of the official term. One who is in default as collector and custodian of public money or property is disqualified from being legally elected to any office of profit or trust under the constitution or laws of the state. This is the plain and natural construction of the language of the constitution. These views find abundant support in the authorities. See *Territory v. Smith*, 3 Minn. 240 (Gil. 164); *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802; *State v. Clarke*, 3 Nev. 566; *Searcy v. Grow*, 15 Cal. 117; *People v. Leonard*, 73 Cal. 230, 14 Pac. 853; *Drew v. Rogers (Cal.)*, 34 Pac. 1081; *In re Corliss*, 11 R. I. 638; *Carson v. McPhetridge*, 15 Ind. 327; *Jeffries v. Rowe*, 63 Ind. 592; *Hill v. Territory (Wash. T.)*, 7 Pac. 63. There is a division in the authorities upon the subject, but the ones cited above and those in line therewith are believed to be sustained by the better logic." See *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

⁷² *State v. Sutton*, 63 Minn. 147, 65 N. W. 262, 30 L. R. A. 630.

calls for the application of the rule which renders voidable a transaction of an agent with himself, or in which he has an interest adverse to his principal. A transaction by a public officer with himself or with a partnership of which he is a member, or in which he seeks in any way to make a profit for himself is invalid;⁷³ though if it be made as agent of a public corporation the latter may validate it by consent or ratification if no statute interferes.⁷⁴ Statutes in many states expressly forbid that any municipal officer shall be a party to or be directly or indirectly interested in any contract or agreement of a city. Some of these statutes provide that the transaction shall be void; others provide for criminal punishment and are construed as impliedly making the transaction void.⁷⁵ Where there is no such provision, and no actual fraud, a valid contract may be made by municipal authorities with a municipal officer;⁷⁶ but not if the contract is one which it is the officer's official duty to see properly performed.⁷⁷

It is a general rule that a public officer whose duty it is to act judicially or *quasi-judicially* is disqualified from exercising jurisdiction in any case in which he has a direct personal interest.⁷⁸ An owner of property which is within a district to be assessed for benefits is usually disqualified from acting as a commissioner to spread the assessment.⁷⁹

⁷³ Fort Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127; First National Bank v. Township Clerk, 141 Mich. 404, 104 N. W. 171. See *supra*, § 177 and cases cited.

⁷⁴ Findlay v. Pertz, 66 Fed. 427.

⁷⁵ Fort Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

⁷⁶ Niles v. Muzzy, 33 Mich. 61, 20 Am. R. 670; United States v. Brindle, 110 U. S. 688; McBride v. Grand Rapids, 47 Mich. 236; Commrs. v. Mitchell, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 570.

⁷⁷ A contract by a city council with a mayor for the care and repair of a park when it was the official duty of the mayor under the charter to see that the park was properly repaired, was held

invalid. Mayor of Macon v. Huff, 60 Ga. 221.

⁷⁸ "So tender is our law of bias on the part of the noblest and purest in behalf of self-interest, that no judge is permitted to sit in a cause in which he has any interest. If a relative by blood or marriage within a certain degree, is interested, he cannot sit and determine the case [statute?]. The same principle applies to jurors and to all courts, federal, state, or municipal." Court in Mayor v. Huff, *supra*.

⁷⁹ Drainage Dist. v. Hutchins, 234 Ill. 31; Drainage Dist. v. Smith, 233 Ill. 417; see Topeka v. Huntoon, 46 Kas. 634; Steckert v. E. Saginaw, 22 Mich. 104; Lickly v.

§ 184. Incompatible offices.—By the common law, if one while occupying a public office accepts another which is incompatible with it, the holding of the first terminates, without judicial proceedings or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first.⁸⁰ Under this rule the question of compatibility must be determined by the courts. When the law forbids the holding of two offices at the same time, or the holding of two lucrative offices, or a state and federal office, the effect is the same. “In each case the holding of the two offices is illegal; it is made so in one case by the policy of the law and in the other by absolute law. In either case the law presumes that the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied.”⁸¹ The common-law rule assumes that the offices are derived from a common source. But state authorities cannot declare a federal office vacant because the incumbent has accepted a state office when the constitution prohibits the holding of both at the same time.⁸² The incompatibility does not consist in the physical inability of one person to discharge the duties of the two offices. There must be some inconsistency in the functions of the offices; some conflict in the duties required of the officer; as where one has supervision of the other, or is required to deal with, control or assist the other. As said by Judge Folger,⁸³ “Where one office is not subordinate to the other nor

Bishop, 150 Mich. 256; Murr v. Naperville, 210 Ill. 371, overruled by Betts v. Naperville, 214 Ill. 380. Compare, Scott v. People, 120 Ill. 129.

⁸⁰ Milward v. Thatcher, 2 T. R. 81, 7 Eng. Rul. Cas. 320 (the leading case); Rex v. Pateman, 2 T. R. 777; Rex v. Patteson, 4 B. & Ad. 9; People v. Carrique, 2 Hill (N. Y.), 93; Mechem, Pub. Off., § 420; Throop, Pub. Off., § 30. “The acceptance of the incompatible office * * * absolutely terminates the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither *quo warranto* nor motion being necessary.” Dil-

lon, Mun. Corp., § 225. “An exception is made to the general rule in those cases in which an officer cannot vacate the first office by his own act, upon the principle that he will not be permitted to do indirectly what he could not do directly.” Mechem, Pub. Off., § 421.

⁸¹ State v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; State v. Draper, 45 Mo. 355.

⁸² De Turk v. Com., 129 Pa. St. 151, 18 Atl. 757, 15 Am. St. 705, 5 L. R. A. 853, note.

⁸³ People v. Green, 58 N. Y. 295; State v. Goff, 15 R. I. 507, 2 Am. St. 921; State v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; Folz v. Kerlin, 105 Ind. 221.

the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that from the nature and relations to each other of the two places they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate one the other, and they must *per se* have the right to interfere one with the other, before they are incompatible at common law." But an officer who has given bond for the faithful performance of his duties cannot relieve himself from its responsibilities by resignation. Thus, where a tax collector accepted the incompatible office of selectman, the court said:⁸⁴ "The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office, unless it is made so by special statutory or constitutional provision." A person may hold any number of offices if they are not incompatible and if the holding is not forbidden by statute.⁸⁵

§ 185. Illustrations.—There are many cases illustrating the rule that a person cannot hold two offices which are incompatible. The following have been held incompatible: Governor and member of the legislature;⁸⁶ sheriff and justice of the peace;⁸⁷ member of prudential committee and auditor of a school district;⁸⁸ governor and mayor of a city;⁸⁹ state treasurer and justice of the peace;⁹⁰ secretary and recorder of a city;⁹¹ con-

⁸⁴ Attorney-General v. Marston, 66 N. H. 485, 22 Atl. 560, 18 L. R. A. 670.

⁸⁵ Badeau v. United States, 130 U. S. 439; Converse v. United States, 21 How. (U. S.) 470.

⁸⁶ Barnum v. Gilman, 27 Minn. 466, 38 Am. Dec. 304.

⁸⁷ Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251.

⁸⁸ Cotton v. Phillips, 56 N. H. 220.

⁸⁹ Attorney-General v. Common Council of Detroit, 113 Mich. 388, 71 N. W. 632, 37 L. R. A. 211.

⁹⁰ State v. Hutt, 2 Ark. 282.

⁹¹ State v. Brinkerhoff, 66 Tex. 45.

stable and justice of the peace;⁹² councilman and city marshal;⁹³ justice of the peace and deputy-sheriff;⁹⁴ township trustee and postmaster;⁹⁵ postmaster and county judge;⁹⁶ alderman and member of congress;⁹⁷ jurat and town clerk;⁹⁸ city clerk and township supervisor.⁹⁹

The following offices have been held compatible: A deputy-sheriff in a city and a director of the public schools of the city;¹ clerk of the circuit court and clerk of the county court;² school director and judge of elections;³ clerk of the district court and court commissioner;⁴ crier and messenger of a court;⁵ member of the assembly and clerk of the court of special sessions.⁶

A lucrative office is one where pay is affixed to the performance of the duties.⁷ The offices of township trustee,⁸ recorder and county commissioner,⁹ supreme court reporter,¹⁰ school trustee of an incorporated town,¹¹ are "lucrative offices."

Park commissioners are officers under the city government, within the meaning of a provision that city officers shall not be eligible to the legislature, where the power to appoint or suspend them is vested in the city council, and they are required to take the constitutional oath of office and are prohibited from holding any other office.¹² If an office is purely municipal, the officer is not within a constitutional provision declaring that no person shall hold more than one lucrative office at the same time.¹³ A

⁹² *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375.

⁹³ *State v. Hoyt*, 2 Oreg. 246.

⁹⁴ *State v. Goff*, 15 R. L. 505, 2 Am. St. 921, note.

⁹⁵ *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197.

⁹⁶ *Hoglan v. Carpenter*, 4 Bush (Ky.), 89.

⁹⁷ *People v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659.

⁹⁸ *Milward v. Thatcher*, 2 T. R. 81, 7 Eng. Rul. Cas. 320, annotated.

⁹⁹ *Northway v. Sheridan*, 111 Mich. 18, 69 N. W. 82.

¹ *State v. Bus*, 135 Mo. 325, 33 L. R. A. 616.

² *State v. Lusk*, 48 Mo. 242.

³ *In re District Attorney*, 11 Phila. 645.

⁴ *Kenney v. Goergen*, 36 Minn. 90.

⁵ *Preston v. United States*, 37 Fed. 417.

⁶ *People v. Green*, 58 N. Y. 295.

⁷ *State v. Kirk*, 44 Ind. 401.

⁸ *Foltz v. Kerlin*, 105 Ind. 221.

⁹ *Dalley v. State*, 8 Blackf. (Ind.) 329.

¹⁰ *Kerr v. Jones*, 19 Ind. 351.

¹¹ *Chambers v. Barnard*, 127 Ind. 365, 11 L. R. A. 613, note.

¹² *People v. State Board of Commissioners*, 129 N. Y. 360, 14 L. R. A. 646, annotated.

¹³ *Chambers v. Barnard*, 127 Ind. 365, 11 L. R. A. 613.

county commissioner is not an officer of the commonwealth and cannot be impeached.¹⁴

§ 186. Officers de facto.—A *de facto* officer is one who discharges the duties of an office under color of title. The acts of a *de facto* officer before the title to the office is determined cannot be collaterally assailed.¹⁵ There can be no *de facto* officer where the *de jure* officer is in possession of the office.¹⁶ The doctrine

¹⁴ Opinion of Justices, 167 Mass. 599, 46 N. E. 118.

¹⁵ *Hamlin v. Kassafer*, 15 Oreg. 456, 8 Am. St. 176; *Jewel v. Gilbert*, 64 N. H. 13, 10 Am. St. 357; *People v. White*, 24 Wend. 520. The doctrine of the *de facto* officer merely precludes the questioning of his title as a collateral issue. In actions in which the cause of action or the defence is founded upon rights pertaining to the office, the title is directly in issue and may be litigated. *E. g.* In an action against a police officer for assault and battery, if the defendant justifies by his office, he must prove himself to be an officer *de jure*. *Short v. Symes*, 150 Mass. 298, 15 Am. St. 204. So, a *de facto* officer cannot recover the salary of the office. *Scott v. Chicago*, 205 Ill. 281. "If the right to hold the office is directly attacked by *quo warranto* proceedings, the question is confined to the strict question of constitutionality or regularity and qualification; but if the official action arises collaterally and is questioned as a defense to official action, or by an officer to escape official liability, that is known as a collateral attack." 1 Andrews' American Law, § 388.

¹⁶ As to liability of sureties on the bond of an officer *de facto*, see *Holt Co. v. Scott*, 53 Neb. 176, 73 N. W. 681. In *Jones v. Scanland*, 6 Humph. (Tenn.) 195,—an

action upon an official bond,—it was said: "Although the election of a person as sheriff was void, and his induction into office illegal by reason of his having then been a defaulter to the treasury, and he did not thereby become sheriff *de jure*, yet he became sheriff *de facto*, and those who voluntarily bound themselves for the faithful performance of his duties, as sureties, cannot absolve themselves from their obligation by insisting that he was no sheriff." In *State v. Rhoades*, 6 Nev. 352, it was held: "Where a state treasurer, re-elected in 1866, accepted a new commission and took a new oath, and continued to discharge the duties of the office, but failed to file a new official bond within the time prescribed by law, *held*, that he was an officer *de facto*, and holding as of the new term; and that the sureties on the new bond afterwards filed were estopped from denying that he was holding as of the new term *de jure*. * * *

A person discharging the duties of a public office under color of right is an officer *de facto*, and not a mere intruder. * * *

Where a person discharges the duties of an office as an officer *de facto*, and not as a mere intruder, he and his sureties are estopped by the recitals in his official bond from denying that he is entitled to the office."

that the acts of *de facto* officers are valid¹⁷ applies to the acts of members of the governing body of a municipal corporation.¹⁸ The doctrine, however, has no application to a case where the acts of the officer are challenged at the outset and before any person has been or can be misled or any right of either a public or private character accrued.¹⁹

Before there can be a *de facto* officer there must be a *de jure* office. In a case where it was sought to sustain the acts of certain commissioners who were appointed under an unconstitutional act Mr. Justice Field said:²⁰ "The doctrine which gives validity to acts of officers *de facto*, whatever defect there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent posses-

¹⁷ School District v. Smith, 67 Vt. 566, 32 Atl. 484.

¹⁸ Williams v. Boynton, 147 N. Y. 426, 42 N. E. 184.

¹⁹ Decorah v. Bullis, 25 Iowa, 12; Lover v. Glochlin, 28 Wis. 364; People v. Nostrand, 46 N. Y. 378. In the leading case of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, the court said: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy or justice, will hold valid, so far as they involve the interests of the public or third persons, where the duties of the office were exercised * * * under color of a known election or appointment, void because the officer was not eligible, * * * such ineligibility being unknown to the public." Holt Co. v. Scott, 53 Neb. 176, 73 N. W. 681, and many cases cited by the court.

²⁰ Norton v. Shelby Co., 118 U. S. 425; People v. Hecht, 105 Cal. 621, 27 L. R. A. 203. During the

pendency of *certiorari* proceedings to determine the legality of the removal of a commissioner of health of a city, it became necessary that someone perform the duties of the office; and the mayor appointed a person "acting commissioner of health," and he performed the duties of the commissioner and was permitted to draw the salary of that office. The mayor had no authority to provide an acting commissioner. Held: the appointee was a mere intruder; there was no such office as acting commissioner and so he could not be deemed to hold that office *de facto*; and he was not commissioner *de facto*, because he was never assumed to be a regular incumbent of that office. Payment of the commissioner's salary to the appointee did not relieve the city from liability to the commissioner upon his removal having been annulled. Kempster v. Milwaukee, 97 Wis. 343, 72 N. W. 743.

sion of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. * * * An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed. * * * For the existence of a *de facto* officer there must be an office *de jure*. * * * Where no office legally exists the pretended officer is merely an usurper, to whose acts no validity can be attached." There are many courts, however, which support the doctrine that, even though a law which purports to create an office is unconstitutional, there is, until a judicial adjudication of its unconstitutionality, sufficient color of legal authority to make the incumbent an officer *de facto*.²¹ The same division among the authorities is found here as was noticed in connection with corporations *de facto*. A mere intruder cannot be regarded as an officer *de facto*.²²

§ 187. *De facto* officers—Continued.—Two persons cannot be officers *de facto* in the same office at the same time. If an office is filled and the duties pertaining thereto are performed by an officer or a body *de jure*, another person or body, although

²¹ *State v. Carroll*, 38 Conn. 449; *Lang v. Mayor, etc., of Bayonne*, 74 N. J. L. 455, 68 Atl. 90. who assumes to perform the duties of a public office without an attempt to qualify is without color

²² *Hamlin v. Kassafer*, 15 Oreg. 456, 3 Am. St. 176, and cases cited. See note in 4 Am. St. 147. One of title. *Creighton v. Com.*, 83 Ky. 147.

claiming the office under color of title, cannot be an officer or body *de facto*, and the relations of the parties cannot be changed by the physical ousting of the body or officer *de jure* from the room where the business is transacted.²³ One is not a *de facto* officer who has not the reputation of being such an officer, and whose acts and authority as such officer are not generally recognized or acquiesced in, and who does not exercise the duties of the office under such circumstances of continuance, reputation, acquiescence or otherwise as to afford a reasonable presumption that he was such officer.²⁴ One who is appointed to an office from which the incumbent has never been legally removed, where the latter has retained possession of the property of the office and continued to discharge its duties, is not an officer *de facto*.²⁵ A person who has been elected to an office in a manner consistent with an honest misapprehension of the law, and not in palpable disregard of its provisions, is an officer *de facto* although the election may be held invalid.²⁶ The members of a commission duly appointed to prepare a city charter are *de facto* officers, although not possessing the necessary qualification of five years' residence.²⁷

§ 188. Compensation.—Any right of a public officer to compensation must rest upon some provision by charter, statute, or ordinance. In the absence of any such provision, he is not entitled to payment for his services.²⁸ His services are not ren-

²³ *In re Gunn*, 19 L. R. A. 519; *McChaon v. Leavenworth County*, 8 Kan. 438; *State v. Blossom*, 19 Nev. 312.

²⁴ *State v. Pinkerman*, 63 Conn. 176, 22 L. R. A. 563; *Hamlin v. Kassafer*, 15 Oreg. 456, 3 Am. St. 176. A person was elected justice of the peace for a term to begin January 6. He qualified and received possession of the docket January 1. Both he and his predecessor believed and assumed that the term began on that date. January 4th he issued a replevin writ. No other official acts appeared. *Held*; the writ was void. There had been no sufficient recognition

by the public, or reputation, as the rightful incumbent. *Dabney v. Hudson*, 68 Miss. 262, 24 Am. St. 276.

²⁵ *Halgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408.

²⁶ *State v. Mayor of Atlantic City*, 52 N. J. L. 332, 8 L. R. A. 697.

²⁷ *People v. Hecht*, 105 Cal. 621, 27 L. R. A. 203.

²⁸ *McCumber v. Waukesha Co.*, 91 Wis. 442, 65 N. W. 51; *Locke v. City of Central*, 4 Colo. 65, 34 Am. Rep. 66; *Langdon v. Casselton*, 30 Vt. 285; *Romero v. United States*, 24 Ct. of Cl. 331, 5 L. R. A. 69; *Kinney v. United States*, 60 Fed.

dered under any contractual relation. Even where compensation has been provided for, the officer has no contractual right prospectively to such compensation for the remainder of his term. It is under the control of the legislature, and in the absence of constitutional restrictions it may be increased, diminished or entirely taken away at any time.²⁹ When a statute allowing an officer compensation admits of two interpretations it should be construed strictly against the officer.³⁰ It is generally provided by constitutions, however, that the salary shall not be increased or diminished during the term of office.³¹

An officer cannot recover extra compensation for performing additional duties attached to his office after he has entered upon the performance of his duties. In a recent case the supreme court of Iowa said: ³² "By the act of the legislature authorizing the creation of boards of health the mayor was made a member of said board and its chairman. While additional duties were thus imposed upon the mayor no additional compensation was allowed therefor. This he knew when he accepted the office, and he is bound to perform the duties of the office for a salary fixed, and cannot legally claim additional compensation for additional services, even though they be subsequently imposed upon him; and it matters not that the salary was inadequate." ³³ Cases of

883. When no salary was attached to the office of mayor, an incumbent of the office could not collect fees for services rendered in the capacity of a justice of the peace. *Howland v. Wright Co.*, 82 Iowa, 164, 47 N. W. 1086. See *Prince v. City of Fresno*, 88 Cal. 407, 26 Pac. 606.

²⁹ *Cooley*, Const. Lim. (7th ed.), 388; *Swan v. Buck*, 40 Miss. 268; *People v. Morrell*, 21 Wend. (N. Y.) 563.

³⁰ *United States v. Clough*, 55 Fed. 373, 5 C. C. A. 140.

³¹ Such a constitutional provision does not apply to police officers. *Mangam v. Brooklyn*, 98 N. Y. 585, 5 Am. Rep. 705.

³² *State v. Olinger* (Iowa, 1897), 72 N. W. 441.

³³ *People v. Villas*, 36 N. Y. 459; *Mayor v. Kelley*, 98 N. Y. 467; *Marshall Co. v. Johnson*, 127 Ind. 238, 26 N. E. 821; *Plerie v. Philadelphia*, 139 Pa. St. 573, 21 Atl. Rep. 90; *Tarnsney v. Board of Edu.*, 147 Mich. 418; *Foote v. Lake County*, 206 Ill. 185. An assignment by a public officer of his unearned salary as security for a debt is contrary to public policy and void. The reasons for this rule apply with greater force to fees payable to an officer, as for example a sheriff, upon the due performance of public duty which cannot be discharged by any other officer. "If he could assign to one he could to many, and every purchaser would be entitled to the rights of assignees of claims

this kind should be distinguished, however, from those in which a municipal officer is requested by the governing body, or by some other agency of the corporation which has power to contract for the purpose, to render special services which lie outside of the duties of his office. The order or request will often constitute a special employment, and involve an implied agreement for compensation. Thus, if a mayor, who is an attorney at law be requested by the council to act as attorney for the city in some specified litigation, he is entitled to recover from the city the value of any legal services rendered in compliance with the request.³⁴

§ 189. Compensation—De facto officers.—The general rule is that the salary follows the legal title to the office. Hence, only an officer who is legally elected or appointed to an office can maintain an action to collect the salary.³⁵ Thus, a police officer cannot recover for salary during a period when he was wrongfully prevented from performing the duties of his position, unless he can prove that he was legally appointed.³⁶ As a general rule, an officer who has been prevented through no fault of his own from performing the duties of his office can recover his salary during the interim, and cannot be compelled to account for wages earned in other and different employments.³⁷ But under a charter providing that police officers shall be paid “for the time engaged in active service,” an officer improperly removed and afterwards reinstated is not entitled to pay pending reinstatement.³⁸ After an officer has performed services under a legal election or appointment, he may recover from the corpor-

against individuals, and in the case of conflicting interests or of disputes between the officer and his alleged transferee the government would have to decide at its peril between them or be subjected to litigation. * * * An officer having assigned his interest in a compensation to become due him for future public services would have less interest in the punctual and efficient performance of his duties, and in the case of improvident assignments might be without the ability to discharge them.” Bow-

ery Nat. Bank v. Wilson, 122 N. Y. 478, 9 L. R. A. 706; Granger v. French, 152 Mich. 356.

³⁴ Mayor, etc. of Niles v. Muzzy, 33 Mich. 61. Contrast, Warner v. Auditor General, 129 Mich. 648; Kobel v. Detroit, 142 Mich. 38.

³⁵ Phelan v. Granville, 140 Mass. 386.

³⁶ Yorks v. City of St. Paul, 62 Minn. 250, 64 N. W. 565.

³⁷ Fitzsimmons v. Brooklyn, 102 N. Y. 536, 7 N. E. 787.

³⁸ Wilkinson v. Saginaw, 111 Mich. 585, 70 N. W. 142.

ation the salary which is by law affixed to the office. But the relation between a public corporation and its officer is not based upon contract, and where the office exists under ordinance there is nothing to prevent the corporation from abolishing it and thus depriving the officer of his salary for the unexpired term.³⁹

A *de facto* officer cannot maintain an action for salary.⁴⁰ But the general rule probably is that the payment of salary to a *de facto* officer before the claim to the office has been determined against him by a competent tribunal will defeat the right of the *de jure* officer to recover the salary from the corporation.⁴¹ Where this rule prevails the remedy of the *de jure* officer is against the *de facto* officer.⁴² But the more logical rule is that

³⁹ In *City Council of Augusta v. Sweeny*, 44 Ga. 463, 9 Am. Rep. 172, the court said: "The right of an incumbent to an office does not depend on any contract in the sense of a bargain between him and the public. His right depends on the law under which he holds. If that law be one capable of being repealed by the power which acts, the right of the officer is gone. That clause of the bill of rights in our constitution which prohibits the passage of a law affecting private rights, or rather the varying of a general law by special legislation so as to affect private rights, cannot affect this question, since this law or ordinance of council which was repealed was not itself a general law, but a law creating a particular office, which the power creating it had the same power to abolish as it had to create." *State v. Pinkerman*, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653. But see *State v. Friedley*, 135 Ind. 119, 34 N. E. 872, 21 L. R. A. 634. A salaried officer cannot set off his salary against a claim by the city against him for moneys collected by him in his official capacity. *New Orleans v. Finnerty*, 27 La. Ann. 681, 21 Am. Rep. 569.

⁴⁰ *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. 280; *Romero v. United States*, 24 Ct. of Cl. 331, 5 L. R. A. 69. See note, 54 Am. Rep. 730.

⁴¹ *Creely Co. v. Milne*, 36 Neb. 301, 19 L. R. A. 689, ann.; *Nichols v. MacLean*, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; *State v. Clark*, 52 Mo. 508; *Parker v. Dakota Co.* 4 Minn. 59 (Gil. 39); *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417; *Michel v. New Orleans*, 32 La. Ann. 1094; *Saline Co. Com'rs v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Wayne Co. Auditor v. Benoit*, 20 Mich. 176; *Demarest v. New York*, 147 N. Y. 203, 41 N. E. 405. Contrast, *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743.

⁴² *Bier v. Gorell*, 30 W. Va. 95, 8 Am. St. 17. In *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L. R. A. 59, the court said: "An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has the right of action to recover against an officer *de facto* by reason of the intrusion of the latter into his office and his receipt of the emoluments thereof. Among others, the following opin-

the *de jure* officer is entitled to recover for the salary notwithstanding it has been paid to a *de facto* officer.⁴³

§ 190. Increase of salary—Misdemeanor.—In some states it is made a misdemeanor for a member of a city council to vote upon any question in which he is interested. Under a charter which provided that no alderman “shall vote on any question in which he is directly or indirectly interested,” and a statute which provided that “when the performance of an act is prohibited by any statute and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor,” it was held that an alderman who voted for an increase of his salary was guilty of a misdemeanor. The court said: “It is not necessary that any injurious consequences should have resulted from the misconduct of the officers. The crime consists in a perversion of their powers and duties to the purposes of fraud and wrong; and they are punishable although no injury resulted to any individual, and no money was drawn from the treasury by reason

ions of English courts may be referred to as sustaining this right of recovery: *Vaux v. Jefferson*, 2 Dyer, 114; *Arris v. Stukeley*, 2 Mod. 260; *Lee v. Drake*, 2 Salk, 468; *Webb's Case*, 8 Rep. 45. By the adoption of the common law of England the principle announced in these cases was adopted as the law of this State, for the principle is of a general nature and applicable to our condition. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit, but a loss would result from such wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States, and the great weight of authority

sustains the doctrine of the common law. “Citing *United States v. Addison*, 6 Wall. 291; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Glasscock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Kessel v. Leiser*, 102 N. Y. 114, 55 Am. Rep. 769; *Nichols v. McLean*, 101 N. Y. 526, 54 Am. Rep. 730; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Hunter v. Chandler*, 45 Mo. 452; *People v. Smithe*, 28 Cal. 21; *Pettit v. Rousseau*, 15 La. Ann. 239. *Contra*, *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353.

⁴³ *State v. Carr*, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177; *Andrews v. Portland*, 79 Me. 485, 10 Atl. 458, 10 Am. St. 280; *Ward v. Marshall*, 96 Cal. 153, 30 Pac. 113; *Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Kempster v. City of Milwaukee*, 97 Wis. 343, 72 N. W. 743.

of the vote to increase the salaries.”⁴⁴ A provision that the salary of an officer shall not be reduced during his term of office does not prevent its reduction between the time of his appointment and of entering upon the duties of the office.⁴⁵

§ 191. Compensation of employees—Attorneys.—The principles governing the compensation of public officers have no application to ordinary employees.⁴⁶ The relation between them and the corporation is one of contract. Where the salary of a city attorney is fixed by law, he can receive no other compensation for legal services rendered.⁴⁷ But unless restrained by its charter, a public corporation may employ an attorney to transact its legal business, and may be compelled to pay a reasonable compensation for such services.⁴⁸ When a city has authority to allow its attorney “fees,” it may allow him a commission on all moneys collected in civil and criminal cases.⁴⁹ A provision that the salary of a city attorney shall not be increased during his term of office prevents an increase in his salary although the city passes from the second to the first class during his term of office.⁵⁰ A county attorney may receive extra compensation for services rendered out of the county under the direction of the county commissioners.⁵¹

§ 192. The mayor.—The mayor is the general executive officer of the corporation, although he sometimes performs the

⁴⁴ *State v. Shea*, 106 Ia. 735, 72 N. W. 300. As bearing upon the question see *State v. Van Aucken* 98 Ia. 674, 68 N. W. 454; *Duty v. State*, 9 Ind. App. 595, 36 N. E. 655; *People v. Bogart*, 3 Park Crim. Rep. 143. In *Macy v. City of Duluth*, 68 Minn. 452, 71 N. W. 687, it is held that under the city charter a poundmaster cannot recover on an implied contract for use and occupation of premises furnished by him to the city for use as a public pound.

⁴⁵ *Wesch v. Common Council*, 107 Mich. 149, 64 N. W. 1051.

⁴⁶ *City of Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674.

⁴⁷ *Liddy v. Long Island City*, 104 N. Y. 218, 10 N. E. 155; *Hayes v.*

Oil City (Pa. St. 1887), 11 Atl. 63. The duty of a city attorney to attend to “all suits, matters and things” in which the city is interested is not limited to suits in any particular courts. *Buck v. Eureka*, 109 Cal. 504, 30 L. R. A. 409.

⁴⁸ *State v. Paterson*, 40 N. J. L. 186; *Langdon v. Casselton*, 30 Vt. 385.

⁴⁹ *Austin v. Johns*, 62 Tex. 179.

⁵⁰ *Barnes v. Williams*, 53 Ark. 205, 13 S. W. 845. As to the fees of a city attorney, see, also, *Smith v. Waterbury*, 54 Conn. 174, 7 Atl. 17.

⁵¹ *Leavenworth County v. Brewer*, 9 Kan. 307; *White v. Polk*, 17 Iowa, 413; *Hoffman v. Greenwood County*, 23 Kan. 307.

judicial duties of a justice of the peace. His court is not a court of record, and the corporate seal need not be attached to a warrant issued by him.⁵² Conferring the jurisdiction of a justice of the peace upon a mayor does not contravene the provision of the constitution that no person charged with the exercise of powers properly belonging to either the executive, legislative or judicial department shall exercise any functions pertaining to either of the others, as this applies only to the different departments of the state government.⁵³ The executive duties of the mayor pertain to him only as an officer of the corporation. Where the mayor presides over the city council he is ordinarily given the right to vote in case of a tie. Where two official newspapers are to be chosen by the council and three papers receive the votes of four aldermen each, the mayor in casting the deciding vote may vote for two papers.⁵⁴ If there is no limitation upon the right of the mayor to cast the deciding vote, it may be upon the question of the choice of a candidate for office as well as upon a question of general legislation.⁵⁵ If the mayor is a lawyer by profession and there is no collusion or fraud, he may recover for services rendered in his professional capacity in defending a suit against the city under the authority of a resolution of the council.⁵⁶ The compensation of a mayor when provided for by charter cannot be entirely taken away by ordinance, under a provision in the charter authorizing the council to change the same.⁵⁷ It is no part of the duties of the mayor to aid private individuals in obtaining their right to examine the books of other city officials, although the mayor is entitled to investigate such books himself and to give the information so acquired to the public. A combination by several individuals to obstruct a mayor in the exercise of an official right to examine the books of a public office may be punishable as a conspiracy.⁵⁸ In the absence of the mayor the officer who is by law designated for the purpose exercises all the powers of the mayor.⁵⁹

⁵² *Santo v. State*, 2 Iowa 155, 63 Am. Dec. 487; *Scott v. Fishbate*, 117 N. C. 265, 30 L. R. A. 696.

⁵³ *People v. Provines*, 34 Cal. 518.

⁵⁴ *Wooster v. Mullins*, 64 Conn. 340, 30 Atl. 144, 25 L. R. A. 694.

⁵⁵ *State v. Pinkerman*, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653.

⁵⁶ *Mayor v. Muzzy*, 33 Mich. 61.

⁵⁷ *State v. Nashville*, 15 Lea (Tenn.), 697, 54 Am. Rep. 427.

⁵⁸ *Tryon v. Pingree*, 112 Mich. 338, 70 N. W. 905, 37 L. R. A. 222.

⁵⁹ *Datz v. Cleveland*, 52 N. J. L. 188, 19 Atl. 17, 7 L. R. A. 431. An order of the mayor, not required

§ 193. Holding over after expiration of term.—Unless the contrary is expressly provided, an officer elected or appointed for a fixed term is entitled to continue in office until his successor is elected and qualified.⁶⁰ Hence, one whose term of office is for a specified period “and until his successor is elected and qualified” will remain in office if the person who is elected to succeed him has not the necessary legal qualifications.⁶¹ A constitutional provision that “the general assembly shall not create any office the tenure of which shall be more than four years” does not prevent the incumbent of an office from holding until his successor is elected and qualified.⁶² The incumbent will hold over when there is a failure to elect his successor.⁶³ But when the failure is due to the neglect of the incumbent to perform some duty imposed upon him by law, such as to give notice of an election, he cannot hold over.⁶⁴

§ 194. Resignation.—At common law an officer cannot resign his office at his pleasure. “As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and the government, to bear. And from this it

to be in writing, may be by letter or orally, in any manner which is understood by all parties as a direction. *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

⁶⁰ *State v. Smith*, 87 Mo. 158; *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; *State v. Bulkeley*, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657; *State v. Harrison*, 113 Ind. 434 at 440, 16 N. E. 384, 3 Am. St. 663; *Kimberlin v. State*, 130 Ind. 120, 14 L. R. A. 858; *McMillin v. Richards*,

45 Neb. 786, 64 N. W. 242; *State v. Fagin*, 42 Conn. 32.

⁶¹ *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. 709, 11 L. R. A. 272. See *People v. Rodgers*, *supra*.

⁶² *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. 663.

⁶³ *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203.

⁶⁴ *People v. Bartlett*, 6 Wend. (N. Y.) 422. A contrary rule would enable the officer to profit by his own carelessness or wrong.

follows of course that after an office was conferred and assumed it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws."⁶⁵ The acceptance of a resignation may be manifested by a formal declaration or by the appointment of a successor. "To complete a resignation," says Mr. Willcock, "it is necessary that a corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant."⁶⁶ In some jurisdictions it is held that the holding of office is not compulsory, and that a resignation takes effect without acceptance, and that a successor may be appointed without the formality of an acceptance of the resignation.⁶⁷ When it is provided that an incumbent shall hold office until his successor is qualified, he is not relieved from the duties of the office even by the acceptance of his resignation.⁶⁸

§ 195. Removal: elective officers.—In the absence of other provision by law, an officer *elected by the people for a definite term*, can be removed only by impeachment, or by judicial judgment of forfeiture, based on incompetency or misconduct.⁶⁹ And even where an authority to remove such an officer has been expressly conferred in general terms upon some executive agency, its exercise is deemed a *quasi-judicial* judgment, which can be rendered only upon charges after affording the officer an opportu-

⁶⁵ Willcock, Corp., p. 129; Grant, Corp., pp. 221, 223, 268; Dillon, Mun. Corp., I, § 163; Rex v. Bower, 1 Barn. & Cress. 585; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Stra. 920; Rex v. Jones, 2 Stra. 1146; Hope v. Henderson, 4 Dev. (N. C.) L. 1; Van Orsdale v. Hazard, 3 Hill (N. Y.) 243; State v. Ferguson, 31 N. J. L. 170. The common-law rule is in force in some states. State v. Clayton, 27 Kan. 442, 41 Am. Rep. 418; Hope v. Henderson, 15 N. C. 29, 25 Am. Dec. 677; Coleman v. Sands, 87 Va. 689.

⁶⁶ Willcock, Corp., p. 239; Ed-

wards v. United States, 103 U. S. 471.

⁶⁷ Reiter v. State, 51 Ohio St. 74, 23 L. R. A. 681; People v. Porter, 6 Cal. 26; State v. Lincoln, 4 Neb. 260; State v. Clark, 3 Neb. 566; Bunting v. Willis, 27 Gratt. 144, 21 Am. Rep. 338.

⁶⁸ People v. Barnett Tp., 100 Ill. 332; Jones v. Jefferson, 66 Tex. 573; United States v. Green, 53 Fed. Rep. 769; Badger v. United States, 93 U. S. 599. See Olmsted v. Dennis, 77 N. Y. 378.

⁶⁹ Attorney General v. Stratton, 194 Mass. 51.

nity to be heard.⁷⁰ It has even been intimated that such an express authority confers a strictly judicial power—that, for example, to confer it upon a state executive in the absence of constitutional permission would violate the principle of the separation of powers.⁷¹ Such a doctrine would not apply to appointive officers; their removal is usually deemed an administrative act.⁷²

How far the ancient power of corporations in general to amove corporate officers can be invoked in American municipalities to accomplish the removal of an officer *elected by the people* is uncertain.⁷³

§ 196. Removal: appointive officers: indefinite term.—Where the officer is *appointed*, and no term of office is fixed or other regulation made, a power of removal is impliedly vested in the appointing agency. The officer holds at the pleasure of the latter.⁷⁴ In New York, Illinois, California, Kansas, and perhaps

⁷⁰ *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112.

⁷¹ *People v. Stuart*, 74 Mich. 411; compare, *Attorney General v. Joachim*, 99 Mich. 358; and see *State v. Peterson*, 50 Minn. 239, at 243, where the court said: "Whether the power of removal from office for official misconduct is judicial in its nature is a question that has been much discussed, and upon which the courts in this country are not agreed. Some courts hold the affirmative, seeming to proceed upon the ground that the incumbent has a property in his office, of which he cannot be deprived without the judgment of a court, after due notice and a hearing. This view is, of course, in accordance with the doctrine of common law, which regarded an office as a hereditament. See *State v. Pritchard*, 36 N. J. Law, 101; *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112.

"Other authorities hold that the power of removal from office is ad-

ministrative and not judicial. These proceed upon the theory that, under our system of government, public office is a public trust, and not private property; that the right to exercise it is not based upon any contract or grant, but that the office is conferred upon the incumbent as a public agent, to be exercised for the benefit of the public. See *State v. Hawkins*, 44 Ohio St. 98 (5 N. E. 228); *Donahue v. County of Will*, 100 Ill. 94."

⁷² *Fuller v. Attorney General*, 98 Mich. 96, 57 N. W. 33.

⁷³ See 1 Dillon, § 251, *et seq*; *Rex v. Richardson*, 1 Burr. 540; see *Attorney General v. Stratton*, *supra*. Power of a corporation to expel a member does not pertain to a city council. *State v. Jersey City*, 25 N. J. L. 536.

⁷⁴ *People v. Robb*, 126 N. Y. 180; *People v. New York*, 82 N. Y. 491; *Parish v. St. Paul*, 84 Minn. 426; *In re Hennen*, 13 Pet. 230, 10 L. ed. 138; *Willard's Appeal*, 4 R. I. 595;

other states, this rule has been confirmed by constitution.⁷⁵ But to admit of the application of this rule, the law must have given the removing tribunal a continuing power of appointment to the office, as distinguished from a temporary power exhausted in its original exercise.⁷⁶

This implied authority to remove vests in an appointing executive, even though his appointments are subject to the consent or approval of a legislative body. The latter's concurrence in the removal is not necessary.⁷⁷

§ 197. Removal: appointive officers: fixed term.—By some authorities, and especially in the federal government, even *when the term of an appointive office is fixed by law*, if the matter of removal is not expressly regulated the power to remove impliedly vests in the appointing agency as in the case of an officer appointed for an indefinite time. The power to remove is said to be incident to the appointing power.⁷⁸ But the general view seems to be that an officer *appointed for a fixed term* cannot be removed except under an express power, or by judicial process.⁷⁹ The intent of the legislature in each case is, of course, the true guide.

§ 198. Removal: right to hearing.—In some cases a court has held that a certain officer *holding for an indefinite term* could not be removed under the implied power vested in the appoint-

People v. Higgins, 15 Ill. 110; Houseman v. Com., 100 Pa. St. 222; Smith v. Brown, 59 Cal. 672; Patton v. Vaughan, 39 Ark. 211; Spongole v. Curnow, 136 Cal. 580. Power to remove an attorney at law is impliedly reposed in the court which has power to admit him to practice. Sanborn v. Kimball, 64 Me. 140. The presiding officer of a legislative body, not chosen for a term fixed by statute, may be removed at the pleasure of the body. State v. Kilchli, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; State v. Alt, 26 Mo. App. 673.

⁷⁵ Bergen v. Powell, 94 N. Y. 591; Wilcox v. People, 90 Ill. 186; State v. Mitchell, 50 Kas. 289.

⁷⁶ Bergen v. Powell, 94 N. Y. 591.

⁷⁷ Newsom v. Cocke, 44 Miss. 352, 7 Am. Rep. 686; Parsons v. United States, 167 U. S. 324; *In re Hennen*, 13 Pet. 230. In Carr v. State, 111 Ind. 101, an officer required to be appointed by the Secretary of State upon requisition of the secretary of the State Board of Health, whose duties were in the department of the latter, was held not to be removable by the Secretary of State, but to be removable at the pleasure of the Board.

⁷⁸ Parsons v. United States, 167 U. S. 324.

⁷⁹ People v. Healy, 231 Ill. 629; State v. Chatburn, 63 Ia. 659.

ing authority, unless he had been accorded a hearing and upon specific charges. Thus, it was said that a court could not remove an attorney at law except for misconduct and after a hearing.⁸⁰ But such cases are of an exceptional nature. As a general rule, the implied power of removal which attaches to the power to appoint for an unlimited term is absolute and discretionary.⁸¹

But *where the term of an appointive officer is fixed by law*, and a power to remove him has been conferred in terms which do not import an absolute discretion, the officer, by the weight of authority, cannot be removed except upon charges and after he has been given an opportunity to be heard. The intent of the statute is said to be to grant a *quasi-judicial* power which involves a decision after notice and upon definite accusations.⁸² Under variously worded provisions some decisions have indicated a contrary leaning.⁸³ And in the federal government, the power to remove which attaches to the power to appoint is said to be absolute, even where the office is for a fixed term.⁸⁴

Whichever view a court may take of a provision which grants a simple power to remove such an officer, it is almost unanimously conceded that a provision which expressly limits the power of removal to removal "for cause," or for a certain class of causes, impliedly requires that the officer be given prior notice of the charges and an opportunity to be heard against them. Thus, a state superintendent of schools had power to remove a county superintendent "for neglect of duty, incompetency, or immorality." He sent a peremptory notice to the county superintendent removing him for "neglect of duty and incompetency." It was held that the removal was invalid because the county superintendent was entitled to have the charges against

⁸⁰ Sanborn v. Kimball, 64 Me. 140; Strout v. Proctor, 71 Me. 288.

⁸¹ See cases cited to § 196 in note 74. Where the power to remove an officer is absolute, and not conditional upon the making of charges and a hearing, it may be exercised in any mode which definitely announces to him the intention to remove. A valid appointment of a successor is a sufficient exercise of the power. Parish v. St. Paul, 84 Minn. 426.

⁸² People v. Treasurer, 36 Mich. 416; Hallgren v. Campbell, 82 Mich. 255; Field v. Malster, 88 Md. 691.

⁸³ (For a certain term, "unless sooner removed by the governor," etc.) Townsend v. Kurtz, 83 Md. 331; Eckloff v. District of Columbia, 135 U. S. 240.

⁸⁴ Parsons v. United States, 167 U. S. 324.

him specified, and to be given a hearing.⁸⁵ "Wherever cause must be assigned for the removal of the officer, he is entitled to notice and a chance to defend."⁸⁶ The rule applies also to officers whose term is "during good behavior."⁸⁷

Notice may, of course, be waived by appearing and contesting the charge at the time set; and notice, cause, and hearing, may all be waived by an abandonment of the office.

A grant of authority to remove from any kind of office may be so expressed as to indicate an intention that the discretion of the removing agency shall be absolute and unconditional; or, if cause is designated, that the latter's decision as to the existence of the cause may be independently made. In such a case the officer holds virtually at the pleasure of the removing power, and is not entitled to notice and a chance to defend.⁸⁸

⁸⁵ The county superintendent was appointed by a convention of county school-directors for three years. *Field v. Comm.*, 32 Pa. 478. A city charter provided that the city council could remove from office "for incapacity or misconduct" an officer appointed by itself. Charges having been made against an officer, the council appointed a committee to hear all parties and report its finding. The committee held a hearing and made a report; and the testimony taken was read to the council. The council thereupon voted to remove. The removal was held invalid because, though the officer had been given an opportunity to be heard by the committee, he had not been notified of the time of voting in the council and been given a hearing by it. *Maroney v. City Council*, 19 R. I. 2. Under a provision that a board of aldermen "shall be the sole judge of the qualifications, election and returns of its own members." it was held that the board could not summarily remove an alderman on a charge of disqualification without notifying him and investigating. *Denver v. Darrow*, 13 Colo.

460, 16 Am. Rep. 215. See, also, *Ham v. Board*, 142 Mass. 90; *People v. Brooklyn*, 106 N. Y. 64; ("For cause") *State v. St. Louis*, 90 Mo. 19, 1 S. W. 757; ("For official misconduct") *State v. Smith*, 35 Neb. 13, reviewing cases.

⁸⁶ *Hallgren v. Campbell*, 82 Mich. 255.

⁸⁷ *State v. Trenton*, 50 N. J. L. 338; 1 Dillon, *Municipal Corp'ns* (4th ed.), § 250.

⁸⁸ ("At any time for cause deemed sufficient") *State v. McQuade*, 12 Wash. 554, 14 Pac. 897; ("At pleasure," and "if in his opinion the public good requires") *Williams v. Gloucester*, 148 Mass. 256; ("When, in their opinion, he is incompetent") *Trainor v. State Board*, 89 Mich. 162, 15 L. R. A. 95, annotated, where it was held that such a provision, construed to give absolute discretion, did not violate the spirit of a state constitution; ("May at any time remove") *State v. Mitchell*, 50 Kas. 289; ("For any cause deemed sufficient to himself") *People v. Witlock*, 92 N. Y. 191. See, also, *State v. McGarry*, 21 Wis. 496; *State v. St. Louis*, 90 Mo. 19.

§ 199. **Removal: judicial review.**—If the power to remove is *not expressly limited to a designated cause*, a court cannot without special jurisdiction review the exercise of the discretion to remove, or judge the sufficiency of the ground of removal, even in cases where charges and a hearing are deemed essential; subject to the limitation that such a power must be reasonably exercised, and so a cause assigned for removal must have some reference to official conduct, or some bearing upon fitness to continue in office.⁸⁹

Neither can a court without special jurisdiction review the correctness of a conclusion on the evidence *as to the existence of a specified cause*.⁹⁰ But wherever cause and a hearing are essential the officer is entitled on *certiorari* or other proper remedy to a review of the question of jurisdiction, the regularity of the proceedings, and, if removal can be made only for a specified cause, of the question whether the ground of removal is within the meaning of the statute.⁹¹ Whether on such review it must

⁸⁹ Todd v. Dunlap, 99 Ky. 449.

⁹⁰ "The authorities are all to the effect that a grant of power to remove either for cause or at discretion carries with it the exclusive power to hear and decide; and whereas the courts are entirely powerless where the power is discretionary, they are equally so where it is for cause, if the grantee of the power acts within its limits and upon notice, if notice is required; if the removal is for a cause designated by or falling within the grant, the grantee or depository of the removing power is the sole judge of the sufficiency of the evidence to justify the removal." State v. Johnson, 30 Fla. 433, 18 L. R. A. 414.

⁹¹ State v. Prince, 45 Wis. 610. An adjudication of the existence of the cause must actually appear to have been made. See Andrews v. King, 77 Me. 224. "Immorality" as ground for removing a police officer includes seduction. Queen

v. Atlanta, 39 Ga. 318; "Immorality" as applied to a regent of a state university was held to include addiction to the use of intoxicating liquors. Rogers v. Morrill, 55 Kan. 737, 42 Pac. 555. ("Conduct unbecoming an officer;" police officer) Clapp v. Board, 92 N. Y. 415. "Misconduct" which will justify removal must consist of acts and conduct relating to the office from which the removal is sought. Speed v. Detroit, 98 Mich. 360, 22 L. R. A. 842. A register of deeds may be removed for making a false certificate as to the condition of the title, although the making of such certificate is not part of the duties of his office. State v. Leach, 60 Me. 58, 11 Am. Rep. 172. Receiving a bribe is "disorderly conduct" within the meaning of a provision conferring upon the council authority to expel a member for disorderly conduct. State v. Jersey City, 25 N. J. L. 536. An expelled member of a city council

appear that evidence was introduced to sustain the charges, or that the decision to remove was not contrary to the weight of the evidence, or was properly based on the evidence heard rather than on the personal knowledge of the removing officer, are questions which must be decided under particular provisions and practices.⁹²

§ 200. **Manner of trying title to office.**—The title to an office cannot be determined in a collateral proceeding, although sufficient inquiry may be made to determine whether the occupant is a mere intruder.⁹³ If one in possession of an office seeks to have a court review the proceeding of a board of aldermen which interferes with his enjoyment of the office, the proper remedy is *certiorari*. When the title of one in possession is to be tried, the proper remedy is *quo warranto* and not *mandamus*.⁹⁴ The title to an office cannot be tried in an action of replevin for property belonging to the office. As a general rule the appropriate remedy for the particular case is provided by statute.⁹⁵

may be re-elected, and cannot thereafter be again expelled for the same offense. *State v. Jersey City, supra*.

⁹² See *e. g.* *People v. French*, 119 N. Y. 502.

⁹³ *United States v. Alexander*, 46 Fed. 728.

⁹⁴ *Denver v. Darrow*, 13 Colo. 460, 16 Am. St. 215, and note. The writ of *mandamus* being a prerogative writ and not a writ of right may be granted or not, in the discretion of the court. *Reg. v. Churchwardens*, 1 App. Cas. 611, 35 L. T. 381. That *quo warranto* is the appropriate remedy to settle title to office conclusively, see *Rex v. Mayor of Colchester*, 2 T. R. 259, 7 Eng. Rul. Cas. 328; *Leeds v. Atlantic City*, 52 N. J. L. 333; *Matter of Gardner*, 68 N. Y. 467; *Duane v. McDonald*, 41 Conn. 517; *St. Louis Co. Court v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *Bonner v. State*, 7 Ga. 473; *People v. Kilduff*, 15 Ill. 492; *Frey v. Michie*,

68 Mich. 323; *State v. Choate*, 11 Ohio 511; *State v. De Gress*, 53 Tex. 387; *Com. v. Meeser*, 44 Pa. St. 341; *State v. Dunn, Minor*, 46, 12 Am. Dec. 25; *State v. Oates*, 86 Wis. 634, 39 Am. St. 912; *Brown v. Turner*, 70 N. C. 93. In some states *mandamus* is used for this purpose. See *Luce v. Board of Examiners*, 153 Mass. 108; *Dew v. Judges*, 3 Hen. & Munf. 1, 3 Am. Dec. 639; *Harwood v. Marshall*, 9 Md. 83; *Lawrence v. Ingersoll*, 88 Tenn. 52, 17 Am. St. 870; *Boston v. Wilson*, 4 Tex. 400. "*Quo warranto* lies to oust an illegal incumbent from an office, not to induct the legal officer into it." *State v. Sone*, 16 R. I. 620. The validity of the acts of an officer *de facto* can be questioned only by a direct proceeding in *quo warranto* to determine title to his office. *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. 478.

⁹⁵ *Hallgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408.

CHAPTER XVI.

CONTRACT LIABILITIES.

I. PUBLIC OFFICERS.	
§ 201. Liability for loss of public funds.	§ 207. Contract within scope of general powers.
202. Personal liability on contracts.	208. Contract in part <i>ultra vires</i> .
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204. Presentation and demand.	211. Right to recover back illegal taxes.
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I. PUBLIC OFFICERS.

§ 201. **Liability for loss of public funds.**—In some states an officer is regarded as the debtor of the corporation and not as a bailee or trustee of funds intrusted to his care, and is liable for such funds, without reference to the cause of their loss. This is the rule of liability in those states where the officer has the right to use the money as his own and to retain any interest or profit that the funds may earn. It has no application where the officer is considered as a trustee charged with certain duties and responsibilities and where he is held to have no right to the income of the funds. In some states it is made a felony for the officer to use the public funds directly or indirectly, or to receive or to agree to receive interest for their use or deposit.¹ In other cases the officer is held liable on broad grounds of public policy, and the obligations resting upon him are made absolute and unconditional because a different construction would open up the door for fraudulent practices and evasions by public officials. Many of the cases holding officials liable for public funds, lost without their fault or negligence, are decided under local statutes, but a number of them rest squarely on principles of public policy. “It shocks the sense of justice,” said the court in a recent case,²

¹ State v. Copeland, 96 Tenn. 296, 31 L. R. A. 844.

² Tillinghast v. Merrill, 151 N. Y. 135, 34 L. R. A. 678.

“that the public officials should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect. It is at this point, however, that the question of public policy presents itself, and it may well be asked whether it is not wiser to subject a custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.” Hence the court in this case held that a supervisor who acted in good faith and without negligence was liable for public moneys lost by the failure of a firm of private bankers with whom the money had been deposited. In other cases the liability of the officer is made to turn upon the terms of his bond, and is construed as having been enlarged by the bond and made an absolute engagement to pay over the money in any event and under every contingency. This rule has been adopted in many cases on the authority of an important decision of the supreme court of the United States, where it was held that an officer under bond to “keep safely” must make good the public funds stolen from him without his fault.⁸ This stringent rule was modified, however,

⁸ *United States v. Prescott*, 3 How. (44 U. S.) 578. To the same effect are *United States v. Dashiell*, 4 Wall. (71 U. S.) 182; *United States v. Morgan*, 11 How. (52 U. S.) 154; *Boyden v. United States*, 13 Wall. (80 U. S.) 17; *State v. Nevins*, 19 Nev. 162, 3 Am. St. 873; *State v. Lanier*, 31 La. Ann. 423; *Jefferson Co. Com'rs v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 502; *Redwood Co. Com'rs v. Tower*, 28 Minn. 45; *State v. Blair*, 76 N. C. 78; *Hancock v. Hazzard*, 12 Cush, 112, 59 Am. Dec. 171; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363. *Contra*, *Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461. These are principally cases where the money had been stolen

from the office or house of the official, in some cases where it had been placed in a private safe, and in others where it had been taken from a safe furnished by the county. The same rule has been adopted in other instances where the money had been lost through the failure of a bank in which it had been deposited. *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Adams v. Lee*, 72 Miss. 281, 16 So. 242; *State v. Powle*, 67 Mo. 395, 29 Am. Rep. 512; *Ward v. Colfax Co.*, 10 Neb. 293, 35 Am. Rep. 477; *Lowry v. Polk Co.*, 51 Iowa, 50, 33 Am. Rep. 113; *State v. Croft*, 24 Ark. 560; *Havens v. Lathene*, 75 N. C. 505.

in a later decision of that tribunal, where it was held that an officer was excused by the act of God or the public enemy.⁴

The tendency of some authorities is to revert to the common law rule of liability and to hold the officer intrusted with public funds, not an insurer against loss, but "liable only if he acts without proper diligence, caution, prudence and good faith." "We believe," said the court in one case,⁵ "the true rule is that a public officer who receives money by virtue of his office is a bailee and that the extent of his obligation is that imposed by law; that when unaffected by constitutional or legislative provisions his duty and liability is measured by the law of bailment. If a more stringent obligation is desired, it must be prescribed by statute. That his official bond does not extend such obligation, but its office is to secure the faithful and prompt performance of his legal duties."

⁴ *United States v. Thomas*, 15 Wall. (82 U. S.) 337. Swayne, Miller and Strong, J. J., dissented. Mr. Justice Bradley, delivering the opinion of the majority in this case, and treating of the contention that the bond forms the basis of a new rule of responsibility, called attention to the distinction between an absolute agreement to do a thing and a condition to do the same thing inserted in a bond, and said: "The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt nor is it evidence of a debt, and the duty secured thereby does not become a debt until default is made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is not to pay a debt but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes."

⁵ *Wilson v. People, Pueblo &*

A. V. R. Co., 19 Colo. 199, 22 L. R. A. 449. See cases cited where, by the constitution and the statutes, the common-law liability of certain officers was increased. *State v. Walsen*, 17 Colo. 170; *McClure v. La Platte Com'rs*, 19 Colo. 122. In *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675, a county treasurer was held not responsible for public moneys deposited in a bank which had borne a good reputation. The court said that the public officer was no more responsible than a private trustee would be under like circumstances. In *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284 (three judges dissenting), a county treasurer was held not liable for money taken from his safe in his office by robbers who had first beaten him. See, also, *Strout v. Pennell*, 74 Me. at 262; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *State v. Copeland*, 96 Tenn. 296, 31 L. R. A. 844; *Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461.

§ 202. Personal liability on contracts.—The courts are frequently called upon to determine the personal liability of municipal officers upon instruments signed by such officers with their official designation added. If such instruments are made with authority and intent to bind the municipality, the corporation is liable. But both the corporation and officer may be liable on the same instrument. If, for example, the selectmen of a town offer a reward for the arrest and conviction of a criminal, and such public officers sign their names individually, with the designation “Selection of Milton,” they do not, by adding their official designation, take away from their names their ordinary significance as proper names, and make of their collective signatures a composite unit. The promise being otherwise in the usual and proper form for a personal undertaking, they are personally liable.⁶ If it appears from the instrument that the officer did not intend to assume personal liability, he will not be rendered liable by the fact that the instrument is invalid in so far as it purports to bind the corporation.⁷ But where the signers of the note made the promise “as trustees of school district” they are not individually liable, the intention to bind the school district being plain.⁸ If the promise of a public agent is connected with a subject fairly within the scope of his authority, it will be presumed to have been made officially and in his public character, unless it clearly appears that he intended to bind himself personally.⁹ For example, if gravel is sold on the credit of the town upon the order of a surveyor of highways who has authority to make the purchase, the town and not the surveyor is responsible.¹⁰ But if an overseer of the poor, in contracting for the support of a pauper, engages that he will be responsible for the payment of the charges, and credit is given on his personal promise, he is liable.¹¹

II. PUBLIC CORPORATIONS.

§ 203. General liability.—A public corporation is liable upon a contract, which is within the scope of its chartered powers

⁶ *Brown v. Bradlee*, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509.

⁷ *Willitt v. Young*, 82 Iowa, 292, 47 N. W. 990, 11 L. R. A. 115.

⁸ *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Lyon v. Adamson*, 7 Iowa, 509.

⁹ *Parks v. Ross*, 11 How. (U. S.) 362.

¹⁰ *Brown v. Rundlett*, 15 N. H. 360. And see *Hall v. Lauderdale*, 46 N. Y. 70.

¹¹ *Ives v. Hulet*, 12 Vt. 314; *King v. Butler*, 15 Johns (N. Y.) 281.

and has been duly made by the proper officers, in the same manner and to the same extent as a private corporation or a natural person. It may be sued like any individual, and may resort to the courts to enforce its rights and redress its wrongs.¹²

§ 204. Presentation and demand.—Municipal charters ordinarily contain a provision that no action shall be commenced on any “claim” or “claim or demand” until the same shall have been presented for allowance to the city council.¹³ Similar provisions often limit the time within which an action may be brought against the corporation.¹⁴ While the words “claim” and “demand” have a very wide significance, they are not usually construed as including claims arising out of torts.¹⁵ At common law it is not necessary to present a claim arising in tort before bringing suit.¹⁶ If the council neglects to act upon a demand within the sixty days fixed by the charter, it is equivalent to a refusal to allow it.¹⁷

§ 205. The doctrine of ultra vires.—A public corporation derives all its powers from its charter, and the general rule is that it cannot bind itself by any contract in excess of the powers thus conferred upon it.¹⁸ Hence it necessarily follows that *ultra*

¹² *Buffalo v. Bettinger*, 76 N. Y. 393.

¹³ *Kelley v. Madison*, 43 Wis. 638.

¹⁴ *McGaffin v. Cohoes*, 74 N. Y. 387.

¹⁵ *Nance v. Falls City*, 16 Neb. 85; *Fleeth v. Wausau*, 93 Wis. 448, 67 N. W. 729.

¹⁶ *Green v. Spencer*, 67 Iowa, 410, 25 N. W. 681.

¹⁷ *Fleming v. Appleton*, 55 Wis. 90, 12 N. W. 462.

¹⁸ *City of Eufaula v. McNab*, 67 Ala. 588; *Swift v. Falmouth*, 167 Mass. 115, 45 N. E. 184; *Alleghaney Co. v. Parrish*, 93 Va. 615, 25 S. E. 882. Much of the apparent confusion in the law of *ultra vires* is due to the use of the words in different senses. It is used to characterize (1) an act of the directors or officers in excess of their authority as agents of the

corporation; (2) an act of the majority of the stockholders in violation of the rights of the minority; (3) an act done in disregard of the requirements of the charter; (4) an act which the corporation has not the power to do, as being in excess of the corporate powers. In a recent work it is said: “For a time there was an element of uncertainty appearing in the views expressed by the courts, as to whether or not the doctrine should be applied only to the acts of a corporation as such, or whether it should not also be applied to acts of the directors or officers which were in excess of the authority given them in the management of the internal affairs of the corporation. In the former sense only is the doctrine legitimately applicable.” Reese, *Ultra Vires*, § 17. In

vires contracts are not enforceable.¹⁹ This doctrine has with good reason been applied with greater strictness to municipal bodies than to private corporations, and in general a municipality is not estopped from denying the validity of a contract made by its officers when there was no authority for the making of such contract.²⁰ The harshness of the rule has in practice led to the adoption of certain modifications which seem necessary in order to do justice between the parties. It has thus been materially modified by the application of the doctrines of estoppel and implied contract.

§ 206. Estoppel—Contract executed by one party.—The general rule is that there can be no estoppel when the contract is illegal in the sense of being forbidden by law, or where there is a total want of power on the part of the corporation.²¹ But where an act is such that in its external aspects it appears to be within the general powers of a corporation, but is unauthorized because it is done with a secret unauthorized purpose, the defense of *ultra vires* will not avail against a stranger who in good

Camden, etc. R. Co. v. May's Landing, etc. Co., 48 N. J. L. 530, the court said: "In its legitimate use, the expression *ultra vires* should be applied only to such acts as are beyond the powers of the corporation itself." See dissenting opinion. In Chicago, etc. R. Co. v. Union Pac. R. Co., 47 Fed. 15, Mr. Justice Brewer said: "Two propositions are settled. One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which creates it consents, *ultra vires*. * * * The other is that the powers of a corporation are such and such only, as its charter confers; and an act beyond the measure of those powers as either expressly stated or fairly implied is *ultra vires*. * * * These two propositions embrace the whole doctrine of *ultra vires*. They are its alpha and omega."

¹⁹ Cooley, Const. Lim. (7th ed.), p. 272; Dillon, Mun. Corp., I, § 457.

²⁰ Newberry v. Fox, 37 Minn. 141, 33 N. W. 333, 51 Am. St. 830; Mobile v. Moog, 53 Ala. 561; Sutro v. Pettit, 74 Cal. 332, 5 Am. St. 442; Thompson, Corp., V, § 5969. For a strict application of the rule see Mayor of Nashville v. Sutherland, 92 Tenn. 335, 21 S. W. 674, 19 L. R. A. 619.

²¹ In King v. Mahaska Co., 75 Iowa, 329, it was held that a contractor for the building of a courthouse could not recover for extra work where it created a cost in excess of the amount which the people had voted for the law. In Goose River Bank v. Willow Lake School Township, 1 N. Dak. 26, it was held that a school teacher who lacked the necessary legal qualifications could not recover for services rendered. Bloomsburg Imp. Co. v. Bloomsburg, 215 Pa. St. 452, 64 Atl. 602.

faith dealt with the corporation without notice of such intent.²² Although there is some conflict of authorities, the logical rule would seem to be that, when the corporation is estopped to assert the defense of *ultra vires*, the liability thus enforced is on the contract.²³ Thus, it was held that "although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation, or of any statute prohibiting it, and the corporation has by its promise induced a party, relying on such promise and in execution of the contract, to expend money and perform his part thereof, the corporation is *liable on the contract*."²⁴ But by the weight of authority the so-called estoppel which is applied by some courts where a private corporation has accepted performance of a contract and seeks to defend on the ground of *ultra vires*, is not applicable in the case of a public corporation. By many courts even a liability as on a *quantum meruit*, for services performed or materials furnished, is denied. It is said that the equities of the helpless public are stronger, in such cases, than those of the contracting party.²⁵ A party who is sued on a contract with a city may defend on the ground that the city had no power to make the contract.²⁶ There can be no recovery upon

²² Dillon, Mun. Corp. I, § 936.

²³ It is uncertain whether there is an action *on the contract*. See Dillon, Mun. Corp., I, § 444, note, and the cases cited in the next note; Thompson, Corp., V, § 5968; Central Tp. Co. v. Pullman Palace Car Co., 139 U. S. 22.

²⁴ State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, 17 Am. Rep. 702. This language is quoted with approval by Mr. Justice Strong in Hitchcock v. Galveston, 96 U. S. 351, in Columbus Water Works v. Mayor of Columbus, 48 Kan. 99, 15 L. R. A. 354, and in Illinois Tr. & Sav. Bank v. Arkansas City, 76 Fed. 271, 40 U. S. App. 257, 34 L. R. A. 518. In Boss Machine Works v. Park Co. Com'rs, 115 Ind. 234, the court said: "The doctrine of *ultra vires* does not absolve municipal corpo-

rations from the principle of common honesty."

²⁵ Cleveland School Furniture Co. v. Greenville, 146 Ala. 559, 41 So. 862; Eufala v. McNab, 67 Ala. 588, 42 Am. Rep. 118; Zottmon v. San Francisco, 20 Cal. 96; Citizen's Bank v. Spencer, 126 Iowa, 101, 101 N. W. 643; Hope v. Alton, 214 Ill. 102, 73 N. E. 406; State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; (borrowed money) Mayor v. Ray, 19 Wall. 468; Bloomsburg Imp. Co. v. Bloomsburg, 215 Pa. St. 452, 64 Atl. 602.

²⁶ Montgomery City Council v. Montgomery, etc. Ry. Co., 31 Ala. 76.

a contract which is illegal in the sense of being absolutely prohibited by law.²⁷

§ 207. **Contracts within scope of general powers.**—Cities often enter into contracts which, in their purposes, are within the scope of their general powers, but which are made in an irregular manner, or contain *ultra vires* conditions or provisions. A mere irregularity in the manner of exercising or preceding the exercise of power cannot always be asserted as a defense against one who has in good faith parted with value for the benefit of the corporation.²⁸ In a well known case²⁹ it appeared that the city had entered into a contract with certain contractors, by the terms of which they were to pave its streets and receive the negotiable bonds of the city in payment therefor. The city had power to pave the streets but not to issue the bonds. In an action for damages for a breach of the contract the court said: “The present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was therefore, at farthest, only *ultra vires*; and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefit at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return in the mode in which it promised to perform.” Elsewhere the court said: “They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have

²⁷ McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; Argenti v. San Francisco, 16 Cal. 256.

²⁸ (Directory requirement) Moore v. New York, 73 N. Y. 238. The distinction in cases of private corporations between cases where the contract is entirely outside of the granted powers and cases where the particular contract is within the general scope of the corporate powers, but unauthorized

because of some particular circumstance, is fully explained by Chief Justice Sawyer in Miner's Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300. See, also, Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781. Compare, Zottman v. San Francisco, 20 Cal. 96; Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

²⁹ Hitchcock v. Galveston, 96 U. S. 341.

power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful.”

§ 208. **Contract in part *ultra vires*.**—A contract is not necessarily invalid as a whole because a part thereof is *ultra vires*. It is said that a court should not destroy a contract made by parties further than some good reason requires.³⁰ Thus, where a city had power to provide for gas, and entered into a contract with a corporation to furnish it for the city, and as a part of the contract granted to the corporation the exclusive right to use the streets, it was held that the granting of the exclusive franchise was beyond the power of the city. But the court said:³¹ “No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the exclusive right and recover the remainder of the consideration which the city promised to pay. The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially-executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay because the performance of an insignificant portion of it is beyond his power. On the other hand, the true rule is and ought to be the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se*

³⁰ In *East St. Louis v. East St. Louis Gas Co.*, 98 Ill. 415, it appeared that the city had entered into a contract to furnish lights for a number of years. This contract was held beyond its powers, but the court held that there could be a recovery for the lights actual-

ly furnished. See the statement of the rule in *Brown v. Atchison*, 39 Kan. 54.

³¹ *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271, 40 U. S. App. 257, 34 L. R. A. 518 (Sanborn, J.).

nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which was void."³²

§ 209. Liability on implied contract.—The strict doctrine of *ultra vires* is further modified by the rule that when a contract has been performed by one party and money or property has thus come into the possession of the corporation and been applied to its use, the law presumes a contract to restore such property to the rightful owner.³³ This implication is based on the theory that "the obligation to do justice rests upon all persons, natural and artificial; and if the county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." In one of the leading cases³⁴ Chief Justice Field said: "The doctrine of implied municipal obligation applies to cases where money or other property of the party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtains money of another by mistake or without authority of law it is its duty to refund it, not from any contract entered into by it on the subject, but from the general obligation to do justice which binds all persons, natural or artificial. If the city obtains other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner from the like general obligation; the law, which always intends justice, implies a promise. In reference to money or other property it is not difficult to determine, in any particular case, whether liability in respect to the same has attached to the city. The money must have gone into the treasury or have been appropriated by her; and when it is property other than money, it must have been used by her or under her control. But with reference to services rendered the case is different. There, acceptance must be evidenced by ordinance to that effect. If not

³² Oregon St. Nav. Co. v. Winsor, (U. S.) 376; Louisiana v. Wood, 20 Wall. (U. S.) 64; Regan v. 102 U. S. 294; Chapman v. Douglass Co., 107 U. S. 355; Schipper U. S. 362; Western Union T. Co. v. Aurora, 121 Ind. 154, 6 L. R. A. v. Burlington, etc. R. Co., 11 Fed. 318; Pittsburgh, etc. Ry. Co. v. 1, and note; Saginaw G. L. Co. v. Keokuk, etc. Co., 131 U. S. 371. Saginaw, 28 Fed. 529.

³⁴ Argenti v. San Francisco, 16

³³ Marsh v. Fulton Co., 10 Wall. Cal. 255.

originally authorized, no liability can attach upon any ground of implied contract. The acceptance upon which alone the obligation to pay could arise would be wanting." An *ultra vires* contract does not become lawful by being executed; but while the courts will not disturb such a contract so far as executed, it may be disaffirmed by either party upon making restitution so far as is possible of what has been received under it. If the party so disaffirming fails to make restitution, the other party may recover the property or its value in an action upon an implied contract.³⁵

§ 210. Illustrations.—When a municipal corporation sells property and gives a deed which passes no title and receives the person's money and appropriates it to its own use, the purchaser may recover back the purchase money.³⁶ When a city has authority to borrow money and places in the hands of a broker bonds apparently valid, but which are in fact invalid, and the bonds are sold and proceeds received by the city, the transaction is the borrowing of money, and the purchaser of the bonds may disregard them and sue the city for money had and received.³⁷ As the bonds are wholly void they need not be tendered back.³⁸ So, where a city without authority exchanges its bonds for the bonds of a railroad company, it is not liable on the bonds; but if value has been received by the city it can be recovered in an action for money had and received.³⁹ Where a county was authorized to purchase lands, but not to give notes secured by

³⁵ *Marble Co. v. Harvey*, 92 Tenn. 115; *Central Trans. Co. v. Pullman P. C. Co.*, 139 U. S. 60. But these are cases of private corporations. The rule of liability as on a *quantum meruit* has been applied more strictly in cases of public corporations, as will be seen in the cases herein cited. As a general rule such a corporation is never liable for the value of services or property which has been devoted to an unauthorized undertaking; and is not always held liable where the consideration has been devoted to an authorized purpose. *Zottman v. San Francisco*, 20 Cal. 96; *Mayor v. Ray*, 19 Wall. 468; see *contra*, *Gause v. Clarksville*, 5 Dillon, 165.

³⁶ *Pimental v. San Francisco*, 21 Cal. 352. In Massachusetts one who loans money to a town on a note given by the town treasurer without authority, cannot recover it from the town, although the treasurer used the money to pay town debts. *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503.

³⁷ *Louisiana v. Wood*, 102 U. S. 294, 5 Dillon, C. C. 122.

³⁸ *Paul v. Kenosha*, 22 Wis. 266.

³⁹ *Thomas v. Port Hudson*, 27 Mich. 320.

mortgage for the purchase price, it was held that the county held the title to the land as trustee for the vendor, and that unless the sum due was paid within a reasonable time, having reference to the necessity for raising the money by taxation, the county would be compelled to reconvey the land.⁴⁰ The person who furnishes necessities to a pauper whom the municipality is under legal obligation to support can recover for the same from the municipality.⁴¹ So a city is liable for the value of the property of an individual which it uses in the care of the indigent.⁴²

§ 211. Right to recover back illegal taxes.—A number of states have statutes which authorize the recovery of money paid for illegal taxes.⁴³ In the absence of such statutory provisions, cities, villages, counties and towns for which a tax has been collected may, under certain circumstances, be liable in an action by the party from whom the tax has been collected. Such actions are usually brought in *assumpsit* for money had and received.⁴⁴ In the absence of statutory authority such an action can only be maintained when the following conditions are found to concur:

1. The tax must have been illegal and void, and not merely irregular.
2. It must have been paid under compulsion or the legal equivalent.
3. It must have been paid over by the collecting officer and have been received to the use of the municipality.⁴⁵

⁴⁰ Chapman v. Douglass Co., 107 U. S. 349.

⁴¹ Seagraves v. Alton, 13 Ill. 366.

⁴² Nashville v. Toney, 10 Lea (Tenn.), 643. In Gas Co. v. San Francisco, 9 Cal. 453, the city was held liable for gas furnished with the knowledge of the council, although no ordinance or resolution had been passed authorizing it to be furnished. "Where power is given a public officer or corporation to contract with reference to a particular subject, and the statute is silent as to the manner in which the contract shall be made, the public may be held liable as upon an implied contract [implied

in fact], under like circumstances as an individual; but where the power to contract is coupled with specific direction as to the mode of incurring the liability, there can be no implied contract, for the law in such case only authorizes an express contract." 1 Andrews, American Law, § 384. Peterson v. Mayor, 17 N. Y. 449.

⁴³ See Cooley, Taxation, 804.

⁴⁴ Grand Rapids v. Blakely, 40 Mich. 367. See Yates v. Royal Ins. Co., 200 Ill. 202; Gannaway v. Barricklow, 203 Ill. 410.

⁴⁵ First Nat. Bank v. Americus, 68 Ga. 119.

And to these, says Judge Cooley,⁴⁶ should perhaps be added:

4. The party must not have elected to proceed in any remedy he may have had against the assessor or collector.⁴⁷

§ 212. Payment must be compulsory.—The assessment must not only be void, and the corporation actually receive the money, but the payment must also be compulsory. That is, it must be made upon direct and immediate compulsion and under such circumstances that the party can save himself and his property only by paying the illegal demand.⁴⁸ As stated by Judge Dillon,⁴⁹ the coercion must consist of some “actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means or reasonable means of immediate relief except by making payment.”

§ 213. Voluntary payment.—A voluntary payment made with a full knowledge of all the facts and circumstances of the case, although made under a mistaken view of the law, cannot be recovered back. As stated by the supreme court of the United States:⁵⁰ “Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an

⁴⁶ Cooley, *Taxation*, p. 805; Dillon, *Mun. Corp.*, I, § 940. See opinion of Chief Justice Shaw in *Lincoln v. Worcester*, 8 Cush. (Mass.) 55.

⁴⁷ *Ware v. Percival*, 61 Me. 391. A demand is not necessary before bringing suit to recover back illegal taxes unless made so by statute. *Look v. Industry*, 51 Me. 375. Interest is recoverable from the date of demand, but not before. *Boston, etc. Co. v. Boston*, 4 Met. (Mass.) 181. If only a part of the tax was illegal the recovery will be limited to that part, if capable of being distinguished. *Torrey v. Millbury*, 21 Pick. (Mass.) 64. The burden of showing ille-

galities is on the party who counts upon them. *Douglasville v. Johns*, 62 Ga. 423.

⁴⁸ *Union Pac. Ry. Co. v. Dodge Co.*, 98 U. S. 541; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School District*, 57 Pa. St. 433.

⁴⁹ Dillon, *Mun. Corp.*, II, § 944.

⁵⁰ *Union Pac. Ry. Co. v. Dodge Co.*, 98 U. S. 541; *Lamborn v. Dickinson Co.*, 97 U. S. 181; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 283. There is a strong tendency toward giving relief against a mistake of law. See Story, *Eq. Jur.*, § 212a; *Cooper v. Phipps*, L. R. 2 H. L. 149; *Donnell v. Sinclair*, L. R. 6 App. Cas. 181, 190.

immediate seizure of his person or property, such payment must be deemed to be voluntary and cannot be recovered back. And the fact that the party at the time of making the payment filed a written protest does not make the payment involuntary.⁵¹ A payment to avoid a sale under an unconstitutional statute is voluntary.⁵² But some overt act is necessary, and the mere issuing of tax warrants or a threat to collect the tax is not compulsion.⁵³ It is not necessary, however, for the taxpayer to wait until his goods are sold or even seized.⁵⁴ In Iowa money paid under protest for illegal taxes is considered as paid under compulsion.⁵⁵ So it has been held that taxes paid under a void law to a person who appeared authorized to collect the tax can be recovered although it was paid without protest.⁵⁶ So one who by force of a statute is unable to place a deed on record because of the existence of illegal taxes charged against it may pay the taxes in order to secure the recording of the deed without such payment being deemed voluntary.⁵⁷

⁵¹ *Sowles v. Soule*, 59 Vt. 131; *Shane v. St. Paul*, 26 Minn. 543; *Powell v. St. Croix Co.*, 46 Wis. 210; *Babcock v. Fond du Lac*, 58 Wis. 231; *Goddard v. Seymour*, 30 Conn. 349. Protest alone cannot change a voluntary into an involuntary payment. *Sonoma Co. Tax Case*, 13 Fed. 789; *Merrill v. Austin*, 53 Cal. 379.

⁵² *Detroit v. Martin*, 34 Mich. 170; *Phelps v. Mayor of New York*, 112 N. Y. 216, 2 L. R. A. 625. Such an assessment does not create a cloud upon the title. *Wells v. Buffalo*, 80 N. Y. 253.

⁵³ *Union Pac. Ry. Co. v. Dodge Co.*, 98 U. S. 541; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233.

⁵⁴ *Atwell v. Zeluff*, 26 Mich. 118.

⁵⁵ *Thomas v. Burlington*, 69 Iowa, 140. See *Robinson v. Ruggles*, 50 Iowa, 240.

⁵⁶ *Tuttle v. Everett*, 51 Miss. 27.

⁵⁷ *State v. Nelson*, 41 Minn. 25, 4 L. R. A. 300, annotated. In this case the court said: "It has always

been considered that the payment under protest of an illegal tax or demand, to an officer armed with a warrant authorizing him to enforce the payment by imprisonment or by seizure and sale of property, and who is about to so exercise his authority, is not voluntary and may be recovered back. *Dakota County v. Parker*, 7 Minn. 207; *Seeley v. Westport*, 47 Conn. 294; *Allen v. Burlington*, 45 Vt. 202; *Nickodemus v. East Saginaw*, 25 Mich. 456; *Ruggles v. Fond du Lac*, 53 Wis. 436; *Smith v. Farrelly*, 52 Cal. 77; *Guy v. Washburn*, 23 Cal. 111; *Grim v. Weisenberg School District*, 57 Pa. St. 433. Nor is this proposition applicable merely with respect to personal property. The same is true, as it obviously ought to be, when real property is involved. See cases above cited, particularly *Seeley v. Westport*, *Guy v. Washburn*; also *Stephan v. Daniels*, 27 Ohio St. 527; *Valentine v. St. Paul*,

54 Minn. 446. Nor is it necessary, in order to constitute compulsory as distinguished from a voluntary payment, that the unlawful demand be made by an officer who is prepared to enforce it by process. There may be that kind and degree of necessity or coercion which justifies and virtually requires payment to be made of the illegal demands of a private person who has it in his power to seriously prejudice the property rights of another, and to impose upon the latter the risk of suffering great loss if the demand be not

complied with. This is illustrated in the case of *Fergusson v. Winslow*, 34 Minn. 384, and cases cited." The payment of an illegal water charge under threat that the water would be shut off, which would result in closing the plaintiff's foundry, is such "moral duress" as to make the payment compulsory. *Westlake v. St. Louis*, 77 Mo. 47. The fact that an ordinance subjects a person to a fine of \$25 a day for selling liquor without a license made the payment of an illegal license compulsory. *Marshall v. Snediker*, 25 Tex. 460.

CHAPTER XVII.

MUNICIPAL SECURITIES.

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I. WARRANTS AND ORDERS.

§ 214. Power to issue.—Counties, towns and municipal corporations have implied authority to issue instruments in the form of vouchers for money due, certificates of indebtedness for services rendered or property furnished, or orders by one officer of the municipality upon another. Such instruments are necessary and proper in carrying on the administration and antici-

pating the payment of taxes.¹ But in order to be valid such warrants must be issued for a legal purpose and for the amount actually due. They cannot be discounted.²

§ 215. Form.—Warrants are commonly in the form of an order drawn by one officer upon another, by which the drawer authorizes the payment of a certain sum of money to the payee. Statutes prescribing the form are commonly held to be directory.³

§ 216. Negotiability.—In a few cases it has been held that warrants, when negotiable in form, have all the attributes of negotiable paper,⁴ but the overwhelming weight of authority is to the effect that such instruments are not commercial paper within the purview of the law merchant, and that the purchaser takes subject to any defenses which were available between the original parties.⁵ “Although negotiable instruments,” says Mr. Justice Gray,⁶ “they belong to a peculiar class of such instruments, being made by a municipal corporation, and having no validity unless issued for a purpose authorized by law. * * * To invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide*

¹ Mayor v. Ray, 19 Wall. 468, at 477; Shawnee Co. Com'rs v. Carter, 2 Kan. 115; Slingerland v. Newark, 54 N. J. L. 62, 23 Atl. 129; Aull Sav. Bank v. Lexington, 74 Mo. 104.

² Erskine v. Steele Co., 4 N. D. 339, 28 L. R. A. 645; Foster v. Coleman, 10 Cal. 278; Bauer v. Franklin Co., 51 Mo. 205; Arnott v. Spokane, 6 Wash. 442, 33 Pac. 1063; Pugh v. Little Rock, 35 Ark. 75; Million v. Soule, 15 Wash. 261, 46 Pac. 234.

³ Burrton City v. Harvey Co. Bank, 28 Kan. 390.

⁴ Kelley v. Mayor, 4 Hill (N. Y.), 263; Crawford Co. v. Wilson, 7 Ark. 214; Hancock v. Chicot Co., 32 Ark. 575. See Fairchild v. Ogdenburgh, etc. Ry. Co., 15 N. Y. 837; Garvin v. Wiswell, 83 Ill. 215.

⁵ Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499; Police Jury v. Britton, 15 Wall. (U. S.) 566; Mayor of Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164; Claiborne Co. v. Brooks, 111 U. S. 400; Emery v. Mariaville, 56 Me. 315; Sturtevant v. Liberty, 46 Me. 457; Shirk v. Pulaski Co., 4 Dill. (U. S.) 209; Clark v. Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; People v. Johnson, 100 Ill. 537, 39 Am. Rep. 63; Goodnow v. Ramsey Co., 11 Minn. 31 (Gil. 12); School District v. Stough, 4 Neb. 357; State v. Cook, 43 Neb. 318, 61 N. W. 693; Hubbard v. Lyndon, 28 Wis. 674; Eaton v. Berlin, 49 N. H. 219; Hyde v. Franklin Co., 27 Vt. 185; Erskine v. Steele Co., 4 N. D. 339, 28 L. R. A. 645.

⁶ District of Columbia v. Cornell, 130 U. S. 655.

holders absolute obligations to pay, is an abuse of their true character and purpose.” With reference to the power to issue such obligations Mr. Justice Miller says:⁷ “It seems to us to be a question quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. It would be an anomaly justly to be deprecated for our limited territorial boards, charged with certain objects of local administration, to become the fountains of commercial issue capable of floating about in the commercial whirlpool of our great cities.”

§ 217. Effect of acceptance.—A creditor is not obliged to accept a warrant in payment of his claim against a corporation, but if he does accept it and parts with it he loses his right of action on the original debt.⁸ But the original holder of an unpaid or dishonored warrant may abandon it and sue on the original claim.⁹

§ 218. Presentment and demand.—In the absence of any provision to the contrary, municipal obligations are payable at the municipal treasury.¹⁰ Until demand there is no default.¹¹ It is hence the duty of the holder of such instruments to present them to the proper officer for payment before bringing suit;¹² and the fact of presentment, demand and non-payment,

⁷ *Police Jury v. Britton*, 15 Wall. (U. S.) 566.

⁸ *Dalrymple v. Whittingham*, 26 Vt. 345; *Contra*, *Lyell v. Lapeer Co.*, 6 McLean (C. C.), 446.

⁹ *Paddock v. Symonds*, 11 Barb. (N. Y.) 117; *Dyer v. Covington Tp.*, 19 Pa. St. 200; *Varner v. Nobleborough*, 2 Me. 121, 11 Am. Dec. 48. In *Allison v. Juniata Co.*, 50 Pa. St. 351, it was held that the action must be upon the original claim.

¹⁰ *Friend v. Pittsburgh*, 131 Pa. St. 305, 6 L. R. A. 636.

¹¹ *Pekin City v. Reynolds*, 31 Ill. 529, 28 Am. Dec. 244; *Dalrymple v. Whittingham*, 26 Vt. 345; *Central City v. Wilcoxon*, 3 Colo. 566; *East Union Tp. v. Ryan*, 86 Pa. St. 459.

¹² *Varner v. Nobleborough*, 2 Me. 126, 11 Am. Dec. 48.

or facts which will excuse the same, must be alleged and proven. A warrant is due immediately upon presentation and demand although there is no money in the treasury with which to pay it.¹³ In a leading case it was said: "There is nothing in the charter which favors the notion that the liability of the city for road debts is conditioned upon the existence of road funds in the treasury. For road debts the city is absolutely and unconditionally liable as for other debts. This liability cannot be controlled or varied by the form in which the warrant may be drawn or worded by the municipal officers."¹⁴

§ 219. Payable out of a particular fund.—When the law requires that a warrant shall be drawn on a specified fund it cannot be made a general charge upon the treasury. The holder of such a warrant must look to the particular fund for payment.¹⁵ A warrant containing the words "Charge the same to the account of Union Avenue" is payable out of a particular fund.¹⁶ A warrant containing a clause, "payable out of any money not otherwise appropriated,"¹⁷ or "it being for the proportional part of the surplus revenue,"¹⁸ is payable unconditionally. So a warrant payable "for jail purposes."¹⁹ A distinction must be observed between orders drawn payable out of a particular fund and those which are simply chargeable to a particular account.²⁰

§ 220. Rights of indorsee.—The title to a warrant passes by indorsement, and the assignee may sue in his own name,²¹ although he stands in no better position than did the original

¹³ *International Bank v. Franklin Co.*, 65 Mo. 105, 27 Am. Rep. 241; *Terry v. Milwaukee*, 15 Wis. 490; *Mills Co. Nat. Bank v. Mills Co.*, 67 Iowa, 697; *Aull Sav. Bank v. Lexington*, 74 Mo. 104.

¹⁴ *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423.

¹⁵ *Campbell v. Polk Co.*, 76 Mo. 57; *Boro v. Phillips Co.*, 4 Dill. (U. S. C. C.) 216; *M'Cullough v. Mayor*, 23 Wend. (N. Y.) 458; *People v. Wood*, 71 N. Y. 371; *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151; *Northwestern Lumber*

Co. v. Aberdeen, 22 Wash. 404, 60 Pac. 1115.

¹⁶ *Lake v. Williamsburgh*, 4 Denio (N. Y.) 520.

¹⁷ *Campbell v. Polk Co.*, 3 Iowa, 467.

¹⁸ *Pease v. Cornish*, 19 Me. 191.

¹⁹ *Montague v. Horton*, 12 Wis. 599.

²⁰ *Clark v. Des Moines*, 19 Iowa, 199; *Pease v. Cornish*, 19 Me. 191.

²¹ *Kelley v. Mayor*, 4 Hill (N. Y.), 263; *Great Falls Bank v. Farmington*, 41 N. H. 32; *Clark v. Des Moines*, 19 Iowa, 199.

holder.²² He must, however, show that the original consideration for the warrant was such an obligation as the corporation had authority to incur.²³ Where warrants were issued *ultra vires*, and the jurisdiction was one in which the court took the view that an action will lie in such cases upon the original consideration as on a *quantum meruit*, it was held that the indorsement would be treated as an assignment of the right to sue for such consideration.²⁴

§ 221. **Defenses.**—When payment of a warrant is made in good faith the corporation is released from further liability.²⁵ If re-issued after being paid it is void in the hands of an innocent purchaser.²⁶ But there must be some act evidencing an intent to cancel the warrant. Thus, the mere receiving of a warrant in payment of taxes is not of itself payment.²⁷

Want of authority is always a defense to an action on a warrant.²⁸ Although “a warrant signed by the proper officer *prima facie* imports validity and a subsisting cause of action, it is always competent for a municipal corporation, even after the issuance of a warrant on the treasury, to set up the defense of *ultra vires*.”²⁹ So the authority of the officer issuing the warrant is always open to inquiry.³⁰ The statute of limitations runs from the time of demand and refusal.³¹ Where there is want of power to borrow money there can be no recovery on warrants issued therefor, although the money received was used for a purpose for which the corporation had power to contract a debt.³²

²² *Matthis v. Town of Cameron*, 62 Mo. 504.

²³ *School District v. Thompson*, 5 Minn. 280; *Goodnow v. Ramsey Co.*, 11 Minn. 31 (Gil. 12). See *Polk v. Tunica*, 52 Miss. 422.

²⁴ *Gause v. Clarkesville*, 5 Dillon, 165.

²⁵ *Sweet v. Carver Co.*, 16 Minn. 106.

²⁶ *Lake County v. Standley*, 24 Colo. 1, 49 Pac. 23; *Chemung Bank v. Chemung Co.*, 5 Denio (N. Y.) 517.

²⁷ *Willey v. Greenfield*, 30 Me. 452.

²⁸ *Sault Ste. Marie v. Van Du-*

sen, 40 Mich. 429; *Jefferson Co. v. Arrighi*, 54 Miss. 668; *Nash v. St. Paul*, 11 Minn. 174 (Gil. 110).

²⁹ *Cheaney v. Town of Brookfield*, 60 Mo. 53; *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *Salamanca Tp. v. Jasper Co. Bank*, 22 Kan. 696.

³⁰ *Taft v. Pittsford*, 28 Vt. 286; *First Nat. Bank v. Saratoga Co.*, 106 N. Y. 488.

³¹ *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Brewer v. Otoe Co.*, 1 Neb. 373; *Leach v. Wilson Co.*, 68 Tex. 353.

³² *Allen v. Intendant of La Fayette*, 89 Ala. 641, 9 L. R. A. 497.

II. MUNICIPAL BONDS.

§ 222. **Power of public quasi-corporations.**—Legislative authority is necessary to authorize counties, townships and school districts to borrow money and issue negotiable bonds, or to issue negotiable bonds in aid of any public enterprise. It must be clearly conferred but may be implied. Thus, a county may issue bonds under express power to make a donation of “money or other securities” for the benefit of a state insane asylum.³³ Such bodies exist for purposes of local and police regulation, and having the power to levy taxes to defray all public charges created, they have no implied power to make commercial paper of any kind unless it is clearly implied from some express power which cannot be fairly exercised without it.³⁴ It is a power distinct from that of incurring indebtedness for improvements actually authorized; as it is one thing to have the power to incur a debt and to give proper vouchers therefor, and a totally different thing to have the power of issuing obligations unimpeachable in the hands of third persons.³⁵ Thus, the power to subscribe for stock in a railway corporation does not include the power to issue municipal bonds in payment therefor.³⁶ But upon this last proposition the cases are not uniform, as it has been held that the power to contract debts carries with it the power to agree

³³ *Lund v. Chippewa Co.*, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131. See, also, as to implied power, *Carter Co. v. Sinton*, 120 U. S. 517, 30 L. ed. 701. Power to issue bonds payable in gold coin is not conferred on a county by a statute not prescribing the kind of money in which the bonds shall be paid. *Burnett v. Maloney*, 97 Tenn. 697, 34 L. R. A. 541.

³⁴ *Goodnow v. Ramsey Co.*, 11 Minn. 31; *Board of Education v. Blodgett*, 155 Ill. 441, 31 L. R. A. 70; *Police Jury v. Britton*, 15 Wall. (U. S.) 566. The mere failure to provide means for paying the bonds does not render the enabling statute invalid. *Stockton v. Powell*, 29 Fla. 1, 15 L. R. A. 42.

³⁵ *Claiborne Co. v. Brooks*, 111 U. S. 400.

³⁶ *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887; *Young v. Clarendon Tp.*, 132 U. S. 340; *Kelley v. Town of Milan*, 127 U. S. 139, 32 L. ed. 77; *Dent v. Cook*, 45 Ga. 323; *Knapp v. Hoboken*, 39 N. J. L. 394; *Hamlin v. Meadville*, 6 Neb. 227; *Goodnow v. Ramsey Co.*, 11 Minn. 31 (Gil. 12). In *Rushville Gas L. Co. v. City of Rushville*, 121 Ind. 206, 6 L. R. A. 315, the court said with reference to public corporations other than school districts, “issuing bonds to pay for property purchased is a very different thing from issuing bonds to obtain money.”

with creditors as to the time and manner of payment and the issue of negotiable bonds.³⁷

§ 223. Power of municipal corporations.—The powers of cities and incorporated towns are somewhat more liberally construed, but notwithstanding this fact the rule is that the power to borrow money and to issue negotiable paper does not belong to such a corporation as an incident of its creation.³⁸ It is held, however, that express power to borrow money carries with it implied power to issue negotiable bonds.³⁹ Power to issue bonds will authorize their issue in the usual form of negotiable bonds payable to bearer.⁴⁰ Such power is not, however, implied from express authority to subscribe for stock in a railway corporation,⁴¹ or from a grant of power to appropriate money to aid in the construction of a railroad, with authority to levy a tax to provide the money to meet the appropriation.⁴² It is well settled that

³⁷ *Williamsport v. Commonwealth*, 84 Pa. St. 487, 24 Am. Rep. 208; *First Municipality v. McDonough*, 2 Rob. (La.) 244; *Bank of Chillicothe v. Chillicothe*, 7 Ohio (pt. 2), 31; *Douglass v. Virginia City*, 5 Nev. 147; *Richmond v. McGirr*, 78 Ind. 192; *Holmes v. Shreveport*, 31 Fed. 113.

³⁸ *Mayor v. Ray*, 19 Wall. (U. S.) 468; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069; *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887; *Hewitt v. School District*, 94 Ill. 528.

³⁹ *Comanche Co. v. Lewis*, 133 U. S. 198; *Seybert v. Pittsburgh*, 1 Wall. (U. S.) 272, 17 L. ed. 553; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496, followed in *Comm. v. Pittsburgh*, 88 Pa. St. 66; *Evansville v. Evansville, etc. Ry. Co.*, 15 Ind. 395, followed in *Evansville v. Woodbury*, 60 Fed. 718; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *DeVoss v. Richmond*, 18

Gratt. 338, 98 Am. Dec. 646. See *Merrill v. Monticello*, 138 U. S. 673; see comments on this case in 5 *Harvard Law Review*, 157; *Brenham v. German-American Bank*, 144 U. S. 191, 36 L. ed. 390, and cases cited; *Farr v. City of Grand Rapids*, 112 Mich. 99, 70 N. W. 411. Power to issue bonds to take up floating indebtedness, see *Morris v. Taylor*, 31 Oreg. 62, 49 Pac. 660.

⁴⁰ *West Plains Tp. v. Sage*, 32 U. S. App. 725, 69 Fed. 943; *Austin v. Nalle*, 85 Tex. 520.

⁴¹ *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887; *Kelly v. Milan*, 127 U. S. 139, 32 L. ed. 77; *Norton v. Dyersburg*, 127 U. S. 160; *Clalborne Co. v. Brooks*, 111 U. S. 400; *Milan v. Tennessee Cent. Ry. Co.*, 11 Lea (Tenn.), 330.

⁴² *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885, and cases cited in preceding note.

a public corporation cannot, without express authority, issue its negotiable bonds in aid of a railway corporation.⁴³

§ 224. **Ratification of illegal bonds.**—An *ultra vires* act cannot be ratified by any act of the corporation.⁴⁴ Thus, where a corporation, in pursuance of a compromise agreement, consented to the entry of a decree in favor of the validity of certain bonds, the court said: “The act of the mayor in signing that agreement could give no validity to the bonds if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare valid. The mayor had no such authority. The decree of the court was based solely on the declaration of the mayor, in the agreement, that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor in the bill in chancery that the bonds were invalid. The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds.⁴⁵ This was not the case of the submission to a court of a question for its decision on the merits; but it was a consent in advance to a particular decision by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally.”⁴⁶

But when power to issue exists, and the bonds are rendered invalid by reason of some irregularity, they may be ratified by the act of the corporation.⁴⁷ The legislature may validate an

⁴³ *Young v. Clarendon Tp.*, 132 U. S. 340; *Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390; *Claiborne Co. v. Brooks*, 111 U. S. 400; *Town of Coloma v. Eaves*, 92 U. S. 484; *Pitzman v. Freeburg*, 92 Ill. 111; *Delaware Co. v. McClintock*, 51 Ind. 325; *Mississippi, etc. R. R. Co. v. Camden*, 23 Ark. 300; *Clay v. Nicholas Co.*, 4 Bush (Ky.), 154; *Williamson v. Keokuk*, 44 Iowa, 88; *Hawkins v. Carroll Co.*, 50 Miss. 735; *Reineman v. Covington, etc. Ry. Co.*, 7 Neb. 310; *Pennsylvania Ry. Co. v. Philadelphia*, 47 Pa. St. 189; *Fisk v. Kenosha*, 26 Wis. 23; *New*

Orleans, etc. Ry. Co. v. Dunn, 51 Ala. 128.

⁴⁴ *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669; *Lewis v. Shreveport*, 108 U. S. 282, 27 L. ed. 728; *Davless Co. v. Dickinson*, 117 U. S. 657; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *Blen v. Bear River, etc. Co.*, 20 Cal. 602, 81 Am. Dec. 132.

⁴⁵ *Russell v. Place*, 94 U. S. 606.

⁴⁶ *Kelley v. Town of Milan*, 127 U. S. 139, per Blatchford, J.

⁴⁷ *Bolles v. Brimfield*, 120 U. S. 759, 30 L. ed. 786; *Anderson v. Santa Anna Tp.*, 116 U. S. 356; *Otoe Co. v. Baldwin*, 111 U. S. 1,

illegal issue of bonds if at the time of the passage of the curative act its has constitutional authority to authorize an original issue of such bonds.⁴⁸

§ 225. Liability for money received.—Although the cases are not uniform, the rule may be considered as established that when a corporation has issued illegal bonds, and received and applied the proceeds thereof to an authorized purpose, an action will lie against the corporation for money had and received, although there can be no recovery upon the bond.⁴⁹ As stated in a recent case,⁵⁰ municipal corporations are liable to actions of implied *assumpsit* with respect to money or property received by them and applied beneficially to their authorized objects, through contracts which are simply unauthorized as distinguished from contracts which are prohibited by their charters or some other law bearing upon them, or are *malum in se*, or violative of public policy.

§ 226. Right to restrain issue of illegal bonds.—Where no adequate remedy at law exists, a taxpayer may restrain the illegal issue of bonds which would be valid in the hands of an innocent holder for value.⁵¹ But if they are of such a character

28 L. ed. 331; *Black v. Cohen*, 52 Ga. 621; *Bridgeport v. Housatonic Ry. Co.*, 15 Conn. 475; *Mills v. Gleason*, 11 Wis. 470, at 493, 78 Am. Dec. 721; *Comer v. Folsom*, 18 Minn. 219 (Gil. 205); *Kunkle v. Town of Franklin*, 13 Minn. 127 (Gil. 119), 97 Am. Dec. 226. By payment of interest. *Brown v. Bon Homme Co.*, 1 S. D. 216, 46 N. W. 173.

⁴⁸ *Sykes v. Columbus*, 55 Miss. 115; *Katzenberger v. Aberdeen*, 121 U. S. 172. "A municipal subscription to the stock of a railway company or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent enactment, when legislation of that character is not prohibited by the constitution, and

when that which is done would have been legal had it been done under legislative sanction previously given." *Grenada Co. v. Brogden*, 112 U. S. 261, 7 Am. & Eng. Corp. Cas. 329.

⁴⁹ *Bangor Sav. Bank v. Stillwater*, 49 Fed. 721; *Argenti v. San Francisco*, 16 Cal. 255; *Morton v. Nevada*, 41 Fed. 582; *Chapman v. Douglas Co.*, 107 U. S. 348; *Salt Lake City v. Hollister*, 118 U. S. 256.

⁵⁰ *Allen v. The Intendant of La Fayette*, 89 Ala. 641, 9 L. R. A. 497.

⁵¹ *Harrington v. Town of Plainview*, 27 Minn. 224; *Flack v. Hughes*, 67 Ill. 384; *Hodgman v. Chicago, etc. Ry. Co.*, 20 Minn. 48; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215.

as to be void even in the hands of an innocent holder, the taxpayer cannot suffer any loss by reason of their issue, and hence cannot maintain an action for injunction.⁵²

a. PURPOSES FOR WHICH BONDS MAY BE ISSUED.

§ 227. Must be a public purpose.—The money with which to pay maturing bonds must be raised by taxation; and it follows from the general rule governing taxation that negotiable bonds can be issued for public purposes only.⁵³ “The legislature,” said Chief Justice Black,⁵⁴ “has no constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise money for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder.”

§ 228. What are public purposes.—A public corporation may properly incur a debt and issue bonds for the purpose of paving streets,⁵⁵ constructing water-works,⁵⁶ supporting public schools,⁵⁷ constructing public buildings,⁵⁸ acquiring electric light

⁵² McCoy v. Briant, 53 Cal. 247; East Oakland Tp. v. Skinner, 94 U. S. 255.

⁵³ Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238; Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. ed. 455; City of Eufaula v. McNab, 67 Ala. 588, 42 Am. Rep. 118; Baltimore, etc. Ry. Co. v. Spring, 80 Md. 510, 27 L. R. A. 72.

⁵⁴ Sharpless v. Mayor of Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

⁵⁵ Gladstone v. Throop, 71 Fed. Rep. 341, 37 U. S. App. 481; Rogers v. Burlington, 3 Wall. 654, 18 L. ed. 79; *In re* Washington Ave., 69 Pa. St. 352; People v. Flagg, 46 N. Y. 401; Seattle v. Yesler, 1 Wash. 571.

⁵⁶ Land, L. & L. Co. v. Brown, 73 Wis. 294, 3 L. R. A. 473; Kearney v. Woodruff, 115 Fed. 90; Culbertson v. City of Fulton, 127 Ill. 30. As to irrigation bonds, see § 112; Hughson v. Crane, 115 Cal. 404; Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

⁵⁷ Read v. Plattsmouth, 107 U. S. 568, 27 L. ed. 414; Hensley Tp. v. People, 84 Ill. 544; Richards v. Raymond, 92 Ill. 612, 34 Am. Rep. 151; Board of Education v. State, 26 Kan. 44.

⁵⁸ Leavenworth Co. v. Miller, 7 Kan. 479. (Public park), People v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; People v. Chicago, 51 Ill. 17, 2 Am. Rep. 278.

plant,⁵⁹ and, under express legislative authority, to aid in celebrating some great national event, such as the Columbian Exposition,⁶⁰ or the anniversary of its incorporation,⁶¹ or for the entertainment of distinguished visitors upon such occasions.⁶² But no implied authority exists to appropriate money for such purposes.⁶³ The treatment of habitual drunkards in a private institution, which is subject to visitation and inspection, is not a public purpose for which a county can be required to pay.⁶⁴

§ 229. Railways.—Railways are of such a public character that a public corporation may be authorized to aid in their construction, either by subscription to their capital stock or by donation, and the issue of negotiable bonds in payment of such subscription or donation.⁶⁵ Railways are public highways. The public has an interest in them when they belong to a corporation as clearly as it would if they were free or if tolls were payable

⁵⁹ *Electric Light Co. v. Jacksonville*, 36 Fla. 229, 30 L. R. A. 540; *Heilbron v. City of Cuthbert*, 96 Ga. 312, 23 S. E. 206; *City of Newport v. Newport Light Co.*, 84 Ky. 167.

⁶⁰ *Daggett v. Colgan*, 92 Cal. 53, 14 L. R. A. 474, and note.

⁶¹ *Hill v. Easthampton*, 140 Mass. 381.

⁶² *Tatham v. Philadelphia*, 11 Phil. 276.

⁶³ *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; *Hood v. Lynn*, 1 Allen (Mass.), 103; *The Liberty Bell*, 23 Fed. 843. See *Hayes v. Douglas County*, 92 Wis. 429, 31 L. R. A. 213.

⁶⁴ *Wisconsin Keeley Institute Co. v. Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 54.

⁶⁵ *Leavenworth Co. v. Miller*, 7 Kan. 479, containing full discussion; see dissenting opinion of Valentine, J.; *Olcott v. Supervisors*, 16 Wall. 678; *Norton v. Dyersburg*, 127 U. S. 160; *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885; *Gelpcke v. Dubuque*, 1 Wall.

(U. S.) 175, 17 L. ed. 520; *Quincy, etc. Ry. Co. v. Morris*, 84 Ill. 410; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666, disapproving *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Thompson v. Lee County*, 3 Wall. (U. S.) 327; *Dickinson v. Neely*, 30 S. C. 587, 3 L. R. A. 672; *Davidson v. Ramsey County*, 18 Minn. 482; *Ex parte Selma, etc. Ry. Co.*, 45 Ala. 696, 6 Am. Rep. 722; *Society of Savings v. New London*, 29 Conn. 174; *Renwick v. Davenport*, 47 Iowa, 511; *Hallenbeck v. Hahn*, 2 Neb. 377; *Wullenwaber v. Dunigan*, 30 Neb. 877, 13 L. R. A. 811; *Nelson v. Haywood Co.*, 87 Tenn. 781, 4 L. R. A. 648. *Contra*, *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Whiting v. Sheboygan, etc. Ry. Co.*, 25 Wis. 167, 3 Am. Rep. 30. The Michigan court adheres to the decision in *People v. Salem*, *supra*. *People v. State Treasurer*, 23 Mich. 499; *Thomas v. Port Hudson*, 27 Mich. 320; *Atty-General v. Detroit Common Council*, 148 Mich. 71, at 98, and cases cited.

to the state. Travel and transportation are cheapened by them to a degree far exceeding all the charges. This advantage the public has in addition to those of rapidity, comfort and increase of trade.⁶⁶

But bonds issued by a county for the benefit of an insolvent railroad company, with a provision that legal claims against the company held by residents of the county shall first be paid out of the proceeds, are void.⁶⁷ "The effect and scope of the act is simply to levy a tax upon the property of the citizens of the county to pay to certain residents of the county the claims due to them by an insolvent railway company. This is a private purpose and not one of the objects of taxation."

In most of the cases no distinction is made between a subscription to the stock of and a donation to the railway company;⁶⁸ but it has been held that while a subscription to stock is valid, a gift for the same purpose is invalid.⁶⁹ The road to be aided need not be in the municipality and may be in another state.⁷⁰

§ 230. Private purposes.—The public has no such interest in manufacturing and mining enterprises as will justify the exercise of the power of taxation in their aid. And it follows that bonds issued for such purposes even under statutory au-

⁶⁶ *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759.

⁶⁷ *Baltimore, etc. Ry. Co. v. Spring*, 80 Md. 510, 27 L. R. A. 72.

⁶⁸ In *Davidson v. Ramsey Co.*, 18 Minn. 482 (Gil. 432), the court said: "So far as the question of power is concerned, we think it quite unimportant whether the money to be raised is to be given to the company, or loaned to it, or applied to pay for subscriptions to stock. *Stewart v. Polk Co.*, 30 Iowa, 9. As remarked by Chief Justice Black in *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147 and 169, the right to tax depends upon the ultimate use, purpose and object for which the fund is raised. * * * The pur-

pose of constructing a railroad is a public purpose; * * * and if it is thought to be better that an outright gift of money should be made than that the city should become a stockholder in the road, there is nothing to prevent the former course from being adopted."

⁶⁹ *Whiting v. Sheboygan, etc. Ry. Co.*, 25 Wis. 167, 3 Am. Rep. 30; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

⁷⁰ *Bell v. Mobile, etc. Ry. Co.*, 4 Wall. (U. S.) 598; *Chicago, etc. Ry. Co. v. Otoe Co.*, 16 Wall. (U. S.) 667; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *St. Jo., etc. Ry. Co. v. Buchanan Co.*, 39 Mo. 485. See *State v. Dallas Co.*, 72 Mo. 329.

thority are invalid.⁷¹ Thus, it is a violation of constitutional principles limiting the general power of taxation for a city to incur a debt and issue bonds for the purpose of aiding in the construction of a dam over a river within the limits of the municipality for improving the water-power in order to develop the manufacturing interests of the inhabitants.⁷²

§ 231. How determined.—It is well settled that the courts must determine whether the particular purpose under consideration is public or private,⁷³ and in so doing they must be guided largely by considerations of public policy.⁷⁴

b. CONDITIONS PRECEDENT TO LEGAL ISSUE.

§ 232. In general.—The issue of bonds by public corporations is ordinarily authorized upon certain specified conditions. Such conditions may be imposed by the constitution, an act of the legislature, or by the corporate authorities. Those imposed by

⁷¹ See *supra*, § 33. *Loan Ass'n v. Topeka*, 3 Dill. 376, 20 Wall. (U. S.) 655, 22 L. ed. 455; *Osborne v. Adams Co.*, 106 U. S. 181, 109 U. S. 1, 27 L. ed. 835; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 2 Am. & Eng. Corp. Cas. 263; *Blair v. Cuming Co.*, 111 U. S. 363; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185. In *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99, it was held that money could not lawfully be appropriated to provide destitute farmers with seed grain; but the contrary was held in *State v. Nelson Co.* (N. Dak.), 45 N. W. 33, 8 L. R. A. 283, and *In re House Roll No. 284*, 31 Neb. 505. In *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, it was held that a city had no power to issue bonds

in aid of persons suffering from a flood or fire, and that a statute authorizing the issue for such a purpose was unconstitutional. *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6.

⁷² *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216, 11 Am. & Eng. Corp. Cas. 248; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669.

⁷³ *In re Townsend*, 39 N. Y. 171.

⁷⁴ *Perry v. Keene*, 56 N. H. 514. In *Weismer v. Douglas Co.*, 64 N. Y. 91, 21 Am. Rep. 586, Mr. Justice Folger said: "When we come to ask, in any case, what is a public purpose, the answer is not always ready nor easy to be found. It is to be conceded that no pinched or meager sense may be put on the words, and that if the purpose designated by the legislature lie so near the border line as that it may be doubtful on which side it may be domiciled, the court may not set their judgment against that of the law-makers."

the constitution or act of the legislature must be strictly complied with or the bonds will be invalid.⁷⁵ But where the law provided that bonds should not "be valid and binding until such conditions precedent had been complied with," it was held that they might be complied with after the bonds were issued.⁷⁶ After there has been substantial performance of the conditions, the validity of the bonds is not affected by subsequent acts.⁷⁷ Such conditions may be imposed by the corporation although not required to do so by the law.⁷⁸ But an innocent purchaser of bonds issued under such conditions is not required to see that they have been complied with.⁷⁹ When conditions have been submitted to and approved by the voters of a municipality they cannot be waived by the municipal officials,⁸⁰ but must be re-submitted to the people.⁸¹ But it seems that if it is generally known that the conditions have not been complied with, and the bonds are allowed to issue without objection, it will be held to amount to a waiver.⁸² The power to determine when conditions have been performed is an official trust which cannot be delegated by the corporate authorities.⁸³

§ 233. Consent of the people.—A common condition precedent to the issue of bonds is that the consent of a certain proportion of the voters or taxpayers shall first be obtained at a general or special election. This is now required in most of the states. But a popular vote does not confer power to issue aid bonds in the absence of a valid enabling act.⁸⁴ This condition

⁷⁵ *Leavenworth, etc. Ry. Co. v. Platte Co.*, 42 Mo. 171; *Essex Co. Ry. Co. v. Lunenburg*, 49 Vt. 143; *Town of Eagle v. Kohn*, 84 Ill. 292; *Belo v. Forsythe Co.*, 76 N. C. 489; *State v. Moore*, 45 Neb. 12, 63 N. W. 130.

⁷⁶ *Town of Eagle v. Kohn*, 84 Ill. 292.

⁷⁷ *Hodgman v. Chicago, etc. Ry. Co.*, 23 Minn. 153.

⁷⁸ *Mason v. Shawneetown*, 77 Ill. 533; *California, etc. Ry. Co. v. Butte Co.*, 18 Cal. 671; *Hodgman v. Chicago, etc. Ry. Co.*, 20 Minn. 48, 23 Minn. 153; *Coe v. Railway Co.*, 27 Minn. 197.

⁷⁹ *Nelson v. Haywood Co.*, 87 Tenn. 781, 4 L. R. A. 648, 659.

⁸⁰ *Hodgman v. Chicago, etc. Ry. Co.*, 20 Minn. 48, 23 Minn. 153.

⁸¹ *Town of Plattville v. Galena, etc. Ry. Co.*, 43 Wis. 493; *State v. Montgomery*, 74 Ala. 226; *Douglas Co. v. Walbridge*, 38 Wis. 179; *State v. Davless Co.*, 64 Mo. 30.

⁸² *Leavenworth, etc. Ry. Co. v. Douglas Co.*, 18 Kan. 169.

⁸³ *Jackson Co. v. Brush*, 77 Ill. 59; *Knox Co. v. Nichols*, 14 Ohio St. 260.

⁸⁴ *Allen v. Louisiana*, 103 U. S. 80; *Hayes v. Holly Springs*, 114 U. S. 120.

must be strictly complied with;⁸⁵ but irregularities which do not affect the result of the election will not invalidate the bonds in the hands of an innocent purchaser for value.⁸⁶ Reasonable certainty only in the manner of voting is necessary.⁸⁷

§ 234. Manner of obtaining consent.—When a majority of the voters of a municipality are authorized by law to incur the property of all in aid of some public purpose, the record of the proceedings must affirmatively show that the statutory authority has been followed according to its terms.⁸⁸ Thus, where the proceeding is by petition, the petition required by the law must be absolute,⁸⁹ must contain all the facts required by the law⁹⁰ and be signed by the requisite number⁹¹ of duly qualified citizens.⁹² A petition showing the consent of a “majority of taxpayers” is not sufficient when the law requires the consent of a majority of taxpayers exclusive of those taxed for dogs and highway purposes only.⁹³ A required election must be called by the persons designated in the law⁹⁴ and notice must be given in the manner directed.⁹⁵ When the notice is required to be given by the supervisors, it may be by order of the board signed by the clerk.⁹⁶ The notice must state the subject-matter to be voted on with reasonable certainty. Thus, an article in a warrant for a town meeting “to see if the town will loan its credit to aid in the construction” of a railroad is sufficient.⁹⁷ But a notice which does not state the amount of bonds proposed to be issued, the

⁸⁵ *Lewis v. Bourbon Co.*, 12 Kan. 186. See *State v. Saline Co.*, 48 Mo. 390, 8 Am. Rep. 108.

⁸⁶ *Johnson Co. v. Thayer*, 94 U. S. 631; *Commissioners v. Shorter*, 50 Ga. 489; *State v. Hordey*, 39 Kan. 657, 18 Pac. 942. Mere informality in conducting the election will not overcome the presumption that the holder is a *bona fide* holder. *Pana v. Bowler*, 107 U. S. 529.

⁸⁷ *Ranney v. Baeder*, 50 Mo. 600.

⁸⁸ *Rich v. Mentz Tp.*, 134 U. S. 632; *Cowdrey v. Caneadea*, 16 Fed. 532.

⁸⁹ *Craig v. Town of Andes*, 93 N. Y. 405. *Contra*, *Bittinger v. Bell*, 65 Ind. 445.

⁹⁰ *People v. Spencer*, 55 N. Y. 1; *Wellsboro v. New York, etc. Ry. Co.*, 76 N. Y. 182.

⁹¹ *People v. Oldtown*, 88 Ill. 202.

⁹² *People v. Cline*, 63 Ill. 394.

⁹³ *Rich v. Mentz Tp.*, 134 U. S. 632.

⁹⁴ *Jacksonville R. R. Co. v. Virden*, 104 Ill. 339.

⁹⁵ *George v. Oxford Tp.*, 16 Kan. 72.

⁹⁶ *Lawson v. Milwaukee, etc. Ry. Co.*, 30 Wis. 597.

⁹⁷ *Belfast, etc. Ry. Co. v. Brooks*, 60 Me. 569; *Bowen v. Mayor of Greensboro*, 79 Ga. 709.

interest or the time or place of payment thereof, but merely the time of election and the object of the bonds, is insufficient.⁹⁸ A general notice of election need not state the places at which the election will be held when the general election law requires that notices to be posted in each precinct shall contain such statement.⁹⁹ The conditions in the bonds must follow this notice.¹

§ 235. "Majority of voters."—A majority of the legal voters satisfies a statute which requires a majority of the taxpayers.² The consent of the "inhabitants" means the consent of the legal voters.³ A majority of the legal voters means a majority of those voting at an election duly called and held.⁴ A majority of the qualified electors means a majority of the registered voters.⁵ Two-thirds of the qualified voters means two-thirds of those who vote.⁶ A purchaser of county bonds need look no further than the record made by the county board of their determination that the requisite number of votes has been cast.⁷

§ 236. Location and completion of roads.—Where bonds are to be used to aid in the construction of a railroad it is commonly made a condition precedent to their lawful issue and delivery that the road to be aided shall be located on a certain line or completed to a designated point. Such conditions must be

⁹⁸ *Packwood v. Kittitas Co.*, 15 Wash. 88, 33 L. R. A. 673, 45 Pac. 640.

⁹⁹ *Packwood v. Kittitas Co.*, *supra*.

¹ *Skinner v. Santa Rosa*, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512.

² *Hannibal v. Fauntleroy*, 105 U. S. 408.

³ *Walnut Tp. v. Wade*, 103 U. S. 683.

⁴ *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Cass Co. v. Johnston*, 95 U. S. 360, overruling *Harshman v. Bates*, 92 U. S. 569. The supreme court of Missouri subsequently construed the same Missouri statute involved in these cases in the U. S. Supreme Court, and reached a decision contrary to that of the latter court. *State v.*

Harris, 96 Mo. 29, 22 Am. & Eng. Corp. Cas. 43; *Carroll Co. v. Smith*, 111 U. S. 556; *People v. Warfield*, 20 Ill. 160; *People v. Wiant*, 48 Ill. 263; *Griffin v. Inman, etc. Co.*, 57 Ga. 370. "The majority of such electors," as used in section 1, article 2, constitution of Minnesota, means the majority of the electors voting at the election. *Taylor v. Taylor*, 10 Minn. 107 (Gil. 81); *Everett v. Smith*, 22 Minn. 53; *Belknap v. Louisville*, 99 Ky. 474, 20 S. W. 309, 34 L. R. A. 256.

⁵ *Southerland v. City of Goldsboro*, 96 N. C. 49; *McDowell v. Mass., etc. Co.*, 96 N. C. 514.

⁶ *State v. St. Joseph*, 37 Mo. 270.

⁷ *Valley Co. v. McLean*, 49 U. S. App. 131, 79 Fed. 728.

complied with before the bonds are earned.⁸ A condition that the company shall, before a certain date, "have completed, ironed and equipped its road from said village of W. to the city of M., and have the same in operation for the transportation of passengers and freight," is substantially complied with by so constructing the road to within a quarter of a mile of the village of W. and from that point entering the town over the line of another company and using its depot.⁹ The completion of a road to within three-quarters of a mile of the opposite bank of the Mississippi river is not performance of a condition requiring the completion of the road to a town on the opposite side of the river, but the railway company cannot in such case be required to construct a bridge across the river. It is sufficient if it provides such facilities for crossing as at the time of the contract were usual and customary under the circumstances in railroad transportation and as were reasonably adequate and convenient.¹⁰ Whether the time of completion is material will depend upon the language of the statute. When not made of the essence of the contract the municipality will be liable on the bonds if it actually receives the benefits sought by the contract.¹¹ Thus, a railway company does not forfeit its right to a donation by its failure to complete its road within the designated time when the prescribed expenditure has been made within the township limit.¹² The actual location of the road may be made a condition precedent to the submission of the question of aid to the voters.¹³ In such a case, if the condi-

⁸ Portland, etc. Ry. Co. v. Hartford, 58 Me. 23; Woonsocket, etc. Ry. Co. v. Sherman, 8 R. I. 564; Stockton, etc. Ry. Co. v. Stockton, 51 Cal. 328; Virginia, etc. Ry. Co. v. Lyon Co., 6 Nev. 68; State v. Neely, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672.

⁹ State v. Clark, 23 Minn. 422. And see Mo. Pac. Ry. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97.

¹⁰ Hodgman v. Chicago, etc. Ry. Co., 20 Minn. 48. See Winona v. Thompson, 24 Minn. 199, and Winona v. Cowdry, 93 U. S. 612.

¹¹ Nevada Bank v. Steinmütz, 64 Cal. 301; Kansas City Ry. Co. v. Alderman, 47 Mo. 349; Portage Co. v. Wis., etc. Ry. Co., 121 Mass. 460; People v. Holden, 82 Ill. 93; McManus v. Duluth, C. & W. R. Co., 51 Minn. 30; German Savings Bank v. Franklin Co., 128 U. S. 526.

¹² Nixon v. Campbell, 106 Ind. 47.

¹³ Cass v. Jordan, 95 U. S. 373; Treadwell v. Hancock Co., 11 Ohio St. 183.

tions are not complied with and the bonds are nevertheless issued they are invalid unless held by *bona fide* purchasers without notice.¹⁴

C. ESTOPPEL.

§ 237. **When estoppel arises.**—It has been stated that want of power is always a defense to an action on municipal securities, even as against a *bona fide* holder. The validity of such instruments is ordinarily attacked on the grounds: First, because issued or used for other than public purposes; second, because the enabling statute is unconstitutional; or third, because of non-compliance with conditions imposed by the enabling act or the issuing corporation. But the corporation may by its acts place itself in a position where it cannot avail itself of what would but for the doctrine of estoppel be a good defense. No estoppel can arise, however, against the defense of want of power.¹⁵ Even a *bona fide* holder for value is bound to take notice of the law under which the bonds are issued.¹⁶

¹⁴ Purdy v. Lansing, 128 U. S. 557; Mellen v. Lansing, 11 Fed. Rep. 829. In Wilson Co. v. First Nat. Bank, 103 U. S. 770, it was held that it was not necessary that there should have been a definite and final survey and location of the entire line of road before the election. All that was necessary was a substantial location designating the termini and general direction of the road and an estimate of the cost of construction. In some of the state courts, however, a much stricter rule is applied. Thus, where a condition required the construction of a road within twelve hundred feet of a mill, it was held that its construction within two thousand feet was not a compliance with the conditions. Virginia, etc. R. R. Co. v. Lyon Co., 6 Nev. 68. Federal courts disregard fractions of miles in such cases. Johnson Co. v. Thayer, 94 U. S. 631.

¹⁵ Aspinwall v. Davless Co., 22 How. (U. S.) 364; Marsh v. Fulton Co., 10 Wall. (U. S.) 676, 19 L. ed. 1040; Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655; Force v. Town of Batavia, 61 Ill. 100; Bissell v. Kankakee, 64 Ill. 249, 21 Am. Rep. 554; Town of Douglass v. Niantic Sav. Bank, 97 Ill. 228; Williamson v. Keokuk, 44 Iowa, 88; Lamoyille, etc. Ry. Co. v. Fairfield, 51 Vt. 257; Graves v. Saline County, 161 U. S. 359, 40 L. ed. 732. Mr. Simonton (Mun. Bonds, § 192) says: "The true meaning of the term 'want of power' is the total lack of authority in the corporation to act, and every act done by the municipal corporation without power is void and cannot be made valid by any act of the corporation or its officers."

¹⁶ Barnett v. Denison, 145 U. S. 136; Ottawa v. Carey, 108 U. S. 110; Force v. Town of Batavia, 61 Ill. 100.

§ 238. **Authority of officers.**—A public corporation is not estopped to deny the authority of persons who assume to act for it; and it follows that purchasers of bonds must assume the risk of the genuineness of signatures and official character.¹⁷ Mr. Justice Bradley said:¹⁸ “The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank-roads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouths of the public whom they represent. The officers and agents of private corporations intrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by the acts or declarations of its agents * * * I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declaration of its officers from denying their authority to bind it.”

§ 239. **Estoppel by conduct—Illustrations.**—A municipality may by its course of dealing be estopped to interpose a defense growing out of an *irregular* exercise of power. Under such circumstances the holder of the bonds is entitled to the same protection as a *bona fide* holder.¹⁹ Thus, an estoppel may arise by the corporation retaining the consideration, such as stock, received for the bonds, and paying interest on the bonds.²⁰ But

¹⁷ Merchants' Bank v. Bergen Co., 115 U. S. 384; Brown v. Bon Homme Co., 1 S. Dak. 216, 46 N. W. 173; Coler v. Cleburne, 131 U. S. 162; Flagg v. School District, 4 N. Dak. 30, 25 L. R. A. 363, 58 N. W. 499.

¹⁸ Chisholm v. Montgomery, 2 Wood (C. C.), 584.

¹⁹ Rogers v. Burlington, 3 Wall. (U. S.) 654; Bissell v. Jeffersonville, 24 How. (U. S.) 287; Bennington v. Park, 50 Vt. 178; N. H., etc. Ry. Co. v. Chatham, 42 Conn.

465; Steines v. Franklin Co., 48 Mo. 167, 8 Am. Rep. 87.

²⁰ Alvord v. Syracuse Savings Bank, 98 N. Y. 599, 8 Am. & Eng. Corp. Cas. 598; People v. Cline, 63 Ill. 394; Ray Co. v. Vansycle, 96 U. S. 675; State v. Clinton Co., 6 Ohio St. 280. In Pendleton Co. v. Amy, 13 Wall. (U. S.) 297, it appeared that the county issued bonds without a popular vote as required by law. After holding the stock which it received for the bonds for seventeen years the

it must be remembered that such acts do not create an estoppel when no power to issue the bonds existed. If the legislature was without power to authorize the issue of bonds and the enabling statute is therefore invalid, the mere payment of interest or other such acts cannot create or supplement the power which is lacking.²¹ Failure to enjoin the issue of bonds, followed by long acquiescence, has been held to work an estoppel.²² But when suit was brought twelve years after the issue of the bonds to secure a correction of their form, and it appeared that the town officers had been culpably negligent, the relief was granted as against the defendants, who knew all the facts and were trying to obtain an unfair advantage.²³ The mere execution and delivery of bonds will not estop the corporation from asserting the non-performance of conditions precedent.²⁴

§ 240. By judgment.—A judgment against a corporation on a contract, although by default, closes the question of the power of the corporation to make a contract. Hence, “in an action to enforce the collection of a judgment, or the collection of bonds or coupons issued in payment of a judgment against a municipal or *quasi*-municipal corporation, the judgment conclusively estops the corporation from making the defense that the original indebtedness evidenced by it was in excess of the amount

county was held estopped to defend, although the bonds contained no recitals. In *Moulton v. Evansville*, 25 Fed. Rep. 382, the court said: “While it is unquestionably true that the payment of interest will not validate a municipal bond issued without authority of law, yet in cases where the objection is, not a want of power to issue, but of compliance with a condition, in respect to which there may be an estoppel by recital or other act of the city officials, such payments of interest ought to have, and have been held to have, great weight.” See, also, the remarks of Judge Drummond in *Portsmouth Savings Bank v. Springfield*, 4 Fed. Rep. 276. The payment of interest on

all the bonds issued is not a ratification of those issued in excess of the constitutional limit. *Davless Co. v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026.

²¹ *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. ed. 455.

²² *Supervisors of Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, *Contra*, as to mere failure to enjoin. *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215.

²³ *Town of Essex v. Day*, 52 Conn. 483, 11 Am. & Eng. Corp. Cas. 265.

²⁴ *Buchanan v. Litchfield*, 102 U. S. 278. But see *Mutual Ben. Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235.

which the corporation had the power to create, under the limitations of the constitution of the state in which it was incorporated." ²⁵

d. RIGHTS OF BONA FIDE HOLDERS.

§ 241. Who are such.—A bona fide holder of municipal securities is one who purchases for value without notice of any defect or is the successor of one who was such a purchaser.²⁶ A purchaser for value from a *bona fide* holder is entitled to all the rights of such holder, although such purchaser has notice of existing equities.²⁷ A purchaser is not charged with constructive notice of defenses by the pendency of an action to determine the validity of the bonds;²⁸ nor by the fact that the bonds were issued in violation of an injunction issued in a proceeding to which he was not a party.²⁹ The presence of overdue coupons on a bond will not charge the purchaser with notice of defenses;³⁰ but when the bond states that default in the payment of interest will render the bond due and payable, the presence of unpaid coupons is notice that the whole amount of the bond is due.³¹ But a purchaser is bound to take notice of the provision of the constitution, the laws of the state,³² the requirements of the stat-

²⁵ *Lake County v. Platt* (C. C. A.), 79 Fed. 567, at 572; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683; *Cutler v. Huston*, 158 U. S. 423; *Sioux City, etc. R. Co. v. Osceola Co.*, 45 Iowa, 168, 52 Iowa, 26; *Edmundson v. School District (Iowa)*, 67 N. W. 671; *Howard v. Huron*, 5 S. D. 539, 59 N. W. 833, 60 N. W. 803. In *Board of Commissioners v. Pratt*, *supra*, the court said: "The cases of *Commissioners v. Loague*, 129 U. S. 493, and *Kelly v. Town of Milan*, 21 Fed. 842, 127 U. S. 138, are not in conflict with this conclusion. The opinion and the effect of the decision in the former case are explained and limited in *Franklin Co. v. German Sav. Bank*, 142 U. S. 93."

²⁶ *McClure v. Oxford Tp.*, 94 U. S. 429.

²⁷ *Rollins v. Gunnison Co.*, 49 U. S. App. 399, 80 Fed. 682; *Cromwell v. Sac Co.*, 96 U. S. 51; *Suffolk Sav. Bank v. Boston*, 149 Mass. 364, 4 L. R. A. 516; *Lynchburg v. Slaughter*, 75 Va. 57.

²⁸ *Scotland Co. v. Hill*, 132 U. S. 107.

²⁹ *Carroll Co. v. Smith*, 111 U. S. 556.

³⁰ *Cromwell v. Sac Co.*, 96 U. S. 51, 24 L. ed. 195.

³¹ *Mayor v. City Bank*, 58 Ga. 587. As to what is sufficient to put a purchaser on inquiry, see *Parsons v. Jackson*, 99 U. S. 434; *Crow v. Oxford Tp.*, 119 U. S. 215, 30 L. ed. 380.

³² *Knox Co. v. Aspinwall*, 21 How. (U. S.) 539.

ute under which the bonds were issued,⁸³ the public records in relation to the issue,⁸⁴ and of what appears upon the face of the instrument.⁸⁵

§ 242. Defenses available against a bona fide holder.—When bonds are issued in pursuance of powers conferred by the legislature they are valid commercial instruments; but if issued without authority they are invalid even in the hands of *bona fide* holders for value. Want of power to issue the securities is the only defense which can be successfully interposed to a suit by a *bona fide* holder for value who acquired the bond before maturity in reliance upon recitals contained therein and without notice, actual or constructive, of defenses.⁸⁶

§ 243. Recitals in bonds.—As between the original parties the question of compliance with conditions precedent to the lawful issue of bonds is always open to investigation. Every holder of bonds is required to know the law under which they were issued and the terms and conditions imposed by the law upon the corporation as limitations upon its power. Hence, when the enabling statute provides that the bonds shall be void unless the conditions are complied with, every holder takes with notice of this provision and must satisfy himself of the fact of compliance,⁸⁷ as bonds issued in violation of the express terms of the statute are invalid even in the hands of an innocent purchaser for value.⁸⁸ But when the law contemplates that certain officials

⁸³ *Manhattan Co. v. Ironwood*, 43 U. S. App. 369, 74 Fed. 535; *Bank v. School District No. 53*, 3 N. D. 496, 28 L. R. A. 642; *Barnett v. Denison*, 145 U. S. 136. In *McClure v. Oxford Tp.*, 94 U. S. 429, the court said: "Every dealer in municipal bonds which upon their face refer to the statute under which they were issued is bound to take notice of the statute and of all its requirements."

⁸⁴ *Brown v. Ingalls Tp.*, 81 Fed. 485. See § 247, *infra*.

⁸⁵ *Brown v. Bon Homme Co.*, 1 S. D. 216, 46 N. W. 173; *Aurora v. West*, 22 Ind. 88; *Gilson v. Dayton*, 123 U. S. 59.

⁸⁶ *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Brenham v. German-American Bank*, 144 U. S. 173; *Bissell v. Kankakee*, 64 Ill. 249.

⁸⁷ *German Sav. Bank v. Franklin Co.*, 128 U. S. 526; *Anthony v. Jasper Co.*, 4 Dill. (C. C.) 136; *Anthony v. Jasper Co.*, 101 U. S. 693, 25 L. ed. 1005; *Bailey v. Taber*, 5 Mass. 286, 4 Am. Dec. 57. See § 247 as to over-issue.

⁸⁸ *Aspinwall v. Daviess Co.*, 22 How. (U. S.) 364; see *Moore v. Mayor*, 73 N. Y. 238, 29 Am. Rep. 134.

shall determine when the prescribed conditions are complied with, and such officials certify to the facts, the innocent purchaser of the bonds is entitled to rely upon such certificate.³⁹ The rule, as established by many decisions, is thus stated by Judge Dillon:⁴⁰ "If upon a true construction of the legislative enactment conferring the authority (to issue the bonds upon certain conditions), the corporations or certain officers or a given body or tribunal are invested with power to decide whether the conditions precedent have been complied with, then it may well be that their determination of a matter *in pais* which they are authorized to decide will, in favor of the bondholder for value, bind the corporation." This rule applies to non-negotiable as well as to negotiable bonds.⁴¹

§ 244. Effect of recitals—continued.—The rule stated in the preceding section has been frequently approved by the supreme court of the United States. Thus, in a leading case,⁴² Mr. Justice Strong said, with reference to the language of Judge Dillon: "This is a very cautious statement of the doctrine. It may be stated in a slightly different form,—when the legislative authority has been given to a municipality or to its officers to subscribe to the stock of a railroad company and to issue bonds in payment, but only on some precedent condition, such as a popular vote in favor of the subscription; and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tri-

³⁹ Second Ward Sav. Bank v. City of Huron, 80 Fed. 660; Huron v. S. W. Sav. Bank, 86 Fed. 272, 30 C. C. A. 38; Evansville v. Dennett, 161 U. S. 434, 40 L. ed. 760.

⁴⁰ Mun. Corp., I, § 523.

⁴¹ Flagg v. School District, 4 N. Dak. 30, 25 L. R. A. 363, 58 N. W. 499.

⁴² Town of Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579. A corporation cannot be heard to deny that

the bonds were issued for the purpose stated on their face. National Life Ins. Co. v. Board of Education, 62 Fed. 778, 10 C. C. A. 637. The first and leading case upon the subject of the effect of recitals is Commissioners of Knox Co. v. Aspinwall, 21 How. (U. S.) 539, decided in 1858. It has never been overruled although attacked in dissenting opinions in later cases. See Town of Coloma v. Eaves, *supra*.

bunal.” Hence the municipality may, by proper recitals made by duly authorized officials, be estopped from availing itself of the defense of irregularities in the election held to authorize the issue of bonds,⁴³ that the consent of the requisite number of taxpayers has not been duly obtained,⁴⁴ or that the authority to make the stock subscription has expired before the subscription was made.⁴⁵

§ 245. Authority of officials to make recitals.—It is only when the officers have authority to determine whether or not conditions have been complied with that their recital of the fact of performance estops the corporation from showing non-performance. If no authority exists, the purchaser has no more right to rely upon their recital than upon the certificate of a stranger. Hence, where the validity of the bonds depends upon an estoppel claimed to arise upon the recitals in the instrument, the question being as to the existence of the power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The ground of the estoppel is the recitals and official statements of those to whom the law refers the public for authentic and final information on the subject.⁴⁶ It is not necessary that the authority to determine the facts should be conferred on the officers in express terms, as it is enough that the whole control of the matter be given to the officers named.⁴⁷

§ 246. Recital that bonds have been issued “in conformity to law.”—“It is not necessary,” says the supreme court of the

⁴³ *Moran v. Miami Co.*, 67 U. S. 722, 17 L. ed. 342; *Bissell v. Jeffersville*, 24 How. (U. S.) 287, 16 L. ed. 664; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 12 Am. & Eng. Ry. Cas. 563.

⁴⁴ *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583.

⁴⁵ *Moultrie Co. v. Rockingham Sav. Bank*, 92 U. S. 631, 23 L. ed. 631.

⁴⁶ *Dixon Co. v. Field*, 111 U. S. 83, 28 L. ed. 360; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 32 L. ed. 519; *Coffin v. Kear-*

ney Co. Com'rs, 57 Fed. 137, 6 C. C. A. 288; *Brown v. Bon Homme Co.*, 1 S. Dak. 216, 46 N. W. 173; *Flagg v. School District*, 4 N. Dak. 30, 25 L. R. A. 363, 58 N. W. 499.

⁴⁷ *Bernards Tp. v. Morrison*, 133 U. S. 523, 33 L. ed. 766; *Coler v. Dwight School Tp.*, 3 N. Dak. 249, 55 N. W. 587, 28 L. R. A. 649; *Fulton v. Riverton*, 42 Minn. 395, 44 N. W. 257; followed in *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225, 75 N. W. 1050; *Brownell v. Greenwich*, 114 N. Y. 518, 4 L. R. A. 685.

United States,⁴⁸ "that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. * * * This is the rule which has been constantly applied by this court in the numerous cases in which it has been involved. The differences in the results of the judgments depended upon the question whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy related, not to the conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being."⁴⁹

In a case where the bonds under consideration recited that they were issued "in pursuance" of the statute, Mr. Justice Harlan said:⁵⁰ "Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show, to entitle him, *prima facie*, to judgment, was the due appointment of the commissioners and execution by them in fact of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were, in fact, performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of commissioners, and their execution of the

⁴⁸ Dixon Co. v. Field, 111 U. S. 83, 28 L. ed. 360.

⁴⁹ "The facts which the corporation is not permitted, as against a *bona fide* holder, to question in the face of a recital in the bond of their existence are those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested

with authority to execute them and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued." Northern Bank v. Porter Tp., 110 U. S. 608; Brown v. Bon Homme Co., 1 S. D. 216, 46 N. W. 173.

⁵⁰ Montclair v. Ramsdell, 107 U. S. 147.

bonds, with recitals of compliance with the statute.”⁵¹ A recital that the bonds were executed pursuant to an order of the county court is equivalent to an express statement that the ordinance is in conformity with the statute.⁵²

§ 247. Excessive issues.—When the constitution provides that public corporations shall not issue bonds in an amount greater than a specified percentage of the valuation of the taxable property within the corporation limits, to be ascertained by the official valuation for the purposes of taxation, it fixes a limit beyond which the power to issue bonds cannot be conferred. Bonds issued in excess of such limit are void in the hands of *bona fide* holders,⁵³ notwithstanding the fact that they contain a recital that they are issued under and pursuant to the constitution of the state. But when the legislature is the source of the law creating the limitation a different rule seems to apply. After declaring the limitation, it creates or designates a board or an officer as the authority which is to determine whether the condition precedent to the issue has been complied with. In such case the power which limits or restricts may suspend the restriction or limitation. The facts to be determined by the official, such as the amount of taxable property and the amount of existing indebtedness, are extrinsic facts, which bear not so much upon the power to issue the bonds as upon the question whether or not they should be issued at the time in question.⁵⁴ Hence, when the designated officials have determined these questions and issued the bonds, with full recitals of compliance with the law, they are valid in the hands of innocent holders for value although for an amount in excess of the statutory limit.⁵⁵ But when the limita-

⁵¹ *Bernards Tp. v. Morrison*, 133 U. S. 523, 33 L. ed. 766; *Chaffee Co. Com'rs v. Potter*, 142 U. S. 355, 35 L. ed. 1040; *Cotton v. New Providence*, 47 N. J. L. 401.

⁵² *Wesson v. Saline Co.*, 34 U. S. App. 680, 73 Fed. 917.

⁵³ *Dixon Co. v. Field*, 111 U. S. 83, 28 L. ed. 360; *Dillon, Mun. Corp.*, sec. 529; *Lake Co. v. Graham*, 130 U. S. 674; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Davless Co. v. Dickinson*, 117

U. S. 657, 29 L. ed. 1026; *Stockdale v. Wayland School District*, 47 Mich. 226.

⁵⁴ *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Sherman Co. v. Simons*, 109 U. S. 735, 27 L. ed. 1093; *Lake Co. v. Graham*, 130 U. S. 674; *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323.

⁵⁵ *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. ed. 788; *New Providence v. Halsey*, 117 U. S. 336.

tion is based upon a public record, such as an assessment roll, the purchaser of bonds is bound to take notice of such facts as the official records disclose concerning the valuation of taxable property.

In a case of overissue of bonds under a constitutional provision it was said:⁵⁶ "Where the authority to create a debt at all, or beyond a given amount, is made to depend upon evidence furnished by official records, the same rule with regard to recitals in bonds given for the debt should not be applied. Every holder of such bonds is charged with knowledge of all provisions of law relating to their issuance, and if the law points to records as evidence of the existence of the facts required to authorize their issuance, or to limit the amount of the debt the city may create, such records, and not the recitals in the bonds, must be looked to by every one who proposes to deal in the bonds."

⁵⁶ *Citizens' Bank v. City of Terrell*, 78 Tex. 450, at 456, 14 S. W. 1003; *Quaker City Nat. Bank v. Nolan Co.*, 59 Fed. 660. (Statutory limitations) *Montpellier Nat. L. Ins. Co. v. Mead*, 13 S. D. 37, 342, 82 N. W. 78, 83 N. W. 335; *Springfield Safe Deposit, etc. Co. v. Attica*, 85 Fed. 387, 29 C. C. A. 214. In *Francis v. Howard Co.*, 54 Fed. Rep. 487, the court said: "All the decisions of the supreme court of the United States from *Dixon Co. v. Field*, 111 U. S. 83, to *Sutliff v. Board*, 147 U. S. 230, agree that the purchasers of bonds issued by municipalities under au-

thority of laws which limit the amount of bonds to be issued to a certain percentage of the assessment rolls * * * are charged with notice * * * of the amount of bonds which can be validly issued based on such assessment rolls." *Valley Co. v. McLean*, 49 U. S. App. 131, 79 Fed. 728. In *Shaw v. Independent School District*, 40 U. S. App. 475, 77 Fed. 277, it was held that the purchaser could not rely on the recitals when the public records showed that the constitutional limit of indebtedness had been reached.

CHAPTER XVIII.

LIMITATIONS ON INDEBTEDNESS.

§ 248. Power to incur debts.

249. The meaning of indebtedness.

250. Contingent obligations.

§ 251. Contracts requiring annual payments.

252. Anticipation of revenues.

§ 248. Power to incur debts.—As has been noticed in a former section a public corporation may incur a debt whenever it is incident to the exercise of a power to do some specified thing which it is authorized to do; but not by borrowing money unless specially authorized.¹ In the absence of limitation the amount of the debt which may be created under its implied power, or by borrowing money where it has been given a general power to borrow, rests in the discretion of the corporation, but municipal carelessness and extravagance have led to the general adoption of constitutional or charter provisions which limit the amount of indebtedness which may legally be incurred. This limit is determined in various ways, but ordinarily the corporation is prohibited from becoming indebted in an amount greater than a specified percentage on the assessed valuation of the real property within its limits. When such provisions are directed to the legislature they have no effect upon the powers already possessed by corporations. But when directed to the municipalities they repeal all charter provisions inconsistent therewith.² A person dealing with such bodies must take notice of limitations upon their power to contract debts,³ and must determine for himself whether the legal limit has been reached.⁴

¹ See *supra*, § 34.

² *List v. Wheeling*, 7 W. Va. 501; *East St. Louis v. People*, 124 Ill. 655, 23 Am. & Eng. Corp. Cas. 408.

³ *People v. May*, 9 Colo. 80, 13 Am. & Eng. Corp. Cas. 307; *French v. Burlington*, 42 Iowa, 614.

⁴ *La Porte v. Gamewell Fire Alarm Tel. Co.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359; *Law v. People*, 87 Ill. 385; *Atlantic City W. W. Co. v. Read*, 50 N. J. L. 665.

§ 249. **The meaning of indebtedness.**—Such a prohibition is generally held to apply to indebtedness of all kinds, express and implied, current and bonded.⁵ But the authorities are far from uniform.⁶ In some states it includes compulsory obligations incurred for materials which the county is required by law to purchase,⁷ while in others it is confined to such debts as are voluntarily incurred.⁸ Again, there is a conflict on the question whether it includes obligations incurred for the current expenses of the municipality. In some states a corporation is not permitted to incur a liability for ordinary current expenses after the constitutional limit of indebtedness has been reached even though it is covered by current revenues.⁹ Necessity is no ex-

⁵ *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132; *Lake Co. v. Rollins*, 130 id. 662, 32 L. ed. 1060, 26 Am. & Eng. Corp. Cas. 465. Obligations payable out of a particular fund and for which the fund only is liable do not create a debt against the corporation. *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; *Board v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Little v. Portland*, 26 Oregon, 235, 37 Pac. 911; *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612. But see *Baltimore v. Gill*, 31 Md. 375; *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854. Liabilities arising *ex delicto* are not to be included. *Ft. D. Elec. Lt. & P. Co. v. Fort Dodge*, 115 Iowa, 568, 89 N. W. 7; *Thomas v. Burlington*, 69 Iowa, 140.

⁶ See review of authorities in *Swanson v. Ottumwa*, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620 (annotated).

⁷ *Barnard v. Knox Co.*, 105 Mo. 382, 16 S. W. 917, 13 L. R. A. 244, overruling *Potter v. Douglas Co.*, 87 Mo. 240; *Lake Co. v. Rollins*, 130 U. S. 662, reversing *Rollins v. Lake Co.*, 34 Fed. 845; *Prince v. Quincy*, 105 Ill. 138; *Council Bluffs*

v. Stewart, 51 Iowa, 385, 1 N. W. 628; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588. In *People v. May*, 9 Colo. 80, 10 Pac. 641, the court says: "The limitation being applicable to all debts, irrespective of their form, it follows that, in determining the amount of the county indebtedness, county warrants are to be taken into account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitution and void."

⁸ *Barnard v. Knox Co.*, 37 Fed. 563, 2 L. R. A. 426, note; *Grant Co. v. Lake Co.*, 17 Oreg. 453, 21 Pac. 447; *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128; *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189; *Thomas v. Burlington*, 69 Iowa, 140; *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. Rep. 52, 36 L. R. A. 407. Under a constitutional provision which forbids the "creating" of indebtedness beyond the limit, only debts voluntarily incurred are to be counted. *Eaton v. Minnough*, 43 Oregon, 465, 73 Pac. 754.

⁹ *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 44 Am. St. Rep. 222, 23 L. R. A. 402, and elaborate note; *Prince v. Quincy*, 105 Ill.

cuse for contracting a debt in excess of the limit.¹⁰ Thus, in some states, a city which has reached the limit cannot enter into a valid contract for a supply of water for a fixed annual amount unless provision is made for the raising of the money to meet the obligation as it accrues, by taxation.¹¹ A city, when already indebted to the maximum, cannot issue bonds for the purpose of erecting water-works although it will acquire property in exchange for said bonds equal in value to the amount of the bonds and productive of revenue.¹² But a contract for such property does not create an indebtedness, within the meaning of the constitutional limitations, if the entire payment is to be made from the revenue of the property, and the creditor is to look to such revenue solely for his security.¹³ Nor can a city make a valid contract to hire a market house for a stated rental which would be in excess of the annual revenues received from the market.¹⁴ When a debt already exists a city may issue new bonds in pay-

138, 44 Am. Rep. 785; *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *French v. Burlington*, 42 Iowa, 614; *Council Bluffs v. Stewart*, 51 id. 385; *State v. Helena*, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336. *Contra*, *Grant v. Davenport*, 36 Iowa, 396; *Corpus Christi v. Woessner*, 58 Tex. 462; *Laycock v. Baton Rouge*, 35 La. Ann. 475. In *Carter v. Thorson*, 5 S. D. 474, 24 L. R. A. 734, it was held that a constitutional provision prohibiting "the incurring of indebtedness, except in pursuance of appropriations," did not prevent the legislature from incurring or directing the incurring of indebtedness for the usual and current administration of state affairs, without having first made an appropriation for that specific purpose. Hence a contract for doing the public printing was not "incurring an indebtedness." *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854.

¹⁰ *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Windsor v. Des Moines*, 110 Iowa, 175, 81 N.

W. 476, 80 Am. St. Rep. 280.

¹¹ *State v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Salem Water Co. v. Salem*, 5 Oreg. 30.

¹² In *Scott v. Davenport*, 34 Iowa, 208, the court said: "But the fact that the property for which the debt is contracted, is valuable, and a source of profit or revenue, does not remove or change the character of the indebtedness. The purchaser, having become bound to pay, has incurred an indebtedness which he may be compelled to pay. Being thus bound, he is in debt, no matter what amount of property he may have received in consideration for his obligation." *Windsor v. Des Moines*, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. R. 280.

¹³ See *Schnell v. Rock Island*, 232 Ill. 89, and cases cited. If the income of other property of the city is also pledged, a new indebtedness is created.

¹⁴ *Appeal of Erie*, 91 Pa. St. 398.

ment of it and of the interest to accrue thereon.¹⁵ But if the new bonds are sold and the proceeds are not simultaneously used to pay the old bonds a new debt is created.¹⁶ When a judgment

¹⁵ *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31 (funding bonds); *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209.

¹⁶ *Doon Tp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044. In *Birkholtz v. Dinnie*, 6 N. D. 511, 72 N. W. 931, it was held that the indebtedness cannot be increased beyond the limit, although the debt is incurred for the purpose of refunding the indebtedness of the municipality. The debt is temporarily increased, and the increase may be permanent, owing to the loss or diversion of the fund created by the sale of the refunding bonds. Chief Justice Corliss said: "We are unable to discover any sound basis for the view which, in the teeth of a declaration that the indebtedness shall never—i. e., shall not for a day or an hour—exceed a certain percentage of assessed valuation, considers a temporary excess as not within the prohibition. The fact that other debts equal in amount are subsequently paid with the money does not destroy the fact that the debt has been for a season increased beyond the constitutional limit. We do not wish to be understood as holding that refunding bonds cannot be issued to take the place of the old bonds which have matured. An exchange of bond for bond would not even temporarily increase the indebtedness of the city one dollar. It would be merely the substitution of one obligation for another. It would be analogous to the giving of a renewal note at a bank. If the ac-

tion which the city officials proposed to take was a mere exchange of new city bonds for old city bonds, we would hold such action to be legal upon the facts in this record. Nor do we consider it necessary that an exchange of bond for bond should be made. We think that the mere execution of refunding bonds may be authorized even beyond the debt limit, and that they may then be put on the market and sold, on the condition that they are not to be delivered until an equal amount of the old bonds are surrendered. The resolution might provide that, simultaneously with the delivery of the refunding bonds and the payment of the cash therefor, there should be at hand an equal amount of the old bonds, to be then and there extinguished by the use of the cash so received and delivered up to the city as part of the same transaction. But the purpose of the city officials is something radically different from an exchange or a sale guarded in the manner specified. Their plan is to sell the bonds of the city, thus increasing the indebtedness thereof against the prohibitions of the constitution, and leaving uncertain the question whether the old debt will be fully extinguished, or whether a dollar of it will be paid. The scheme is to pay the old debt with the proceeds of the new; but there is no absolute certainty, although there may be a probability, that this will be done. Nothing short of a certainty that the debt will not be increased permanently will

has been obtained upon an obligation not within the prohibition, bonds may be issued for its satisfaction without increasing the indebtedness of the municipality.¹⁷ When suitable provision has been made for the discharge of an obligation, or the money is in the treasury to meet it, the drawing of a warrant upon the treasury for the payment of such obligation or claim does not create a debt.¹⁸ The amount of a sinking fund must be deducted from the apparent debt of a city in order to ascertain its total indebtedness.¹⁹ But money raised and set apart in the treasury for the purpose of payment is not to be considered as reducing the indebtedness, unless by some legal action the fund has been irrevocably devoted and assigned to the defraying of the debt.²⁰ Park-board certificates, secured by mortgage on real estate, and payable only out of a fund arising from assessments for benefits, are not a part of the indebtedness of the city.²¹

§ 250. **Contingent obligations.**—An obligation payable in the future is as much a debt as though due immediately.²² The time when it comes into existence, and not when due, must be con-

suffice, and even that will not suffice if it is temporarily augmented beyond the constitutional limit. We admit that there appear to be some decisions opposed to our ruling. It can probably be said that the weight of authority is against our view. See *City of Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764; *Powell v. City of Madison*, 107 Ind. 106, 8 N. E. 31; *Board of Com'rs of Marion Co. v. Board of Com'rs of Harvey Co.*, 26 Kan. 181, 201; *Opinion of the Justices*, 81 Me. 602, 18 Atl. 291; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Miller v. School Dist. 5 Wyo.* 217, 39 Pac. 879; *Palmer v. City of Helena*, 19 Mont. 61, 47 Pac. 209. But in one of these cases no question of constitutional prohibition was involved. *City of Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764. In none of the

cases was the inhibition of the fundamental law so sweeping in terms as ours."

¹⁷ *Board of Com'rs v. Platt* (C. C. A.), 79 Fed. 567; *Sioux City v. Weare*, 59 Iowa, 95.

¹⁸ *Springfield v. Edwards*, 84 Ill. 626.

¹⁹ *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281. As to what should not be included, see (sum to be paid monthly for lighting streets of a borough for a certain term) *Wade v. Oakmont*, 165 Pa. St. 479; (city "stock") *New York Bank v. Grace*, 102 N. Y. 313; (indebtedness arising in tort) *Thomas v. Burlington*, 69 Iowa, 140; *Austin v. Seattle*, 2 Wash. 667.

²⁰ *Wabash R. Co. v. People*, 202 Ill. 9.

²¹ *Kelly v. Minneapolis*, *supra*.

²² *Law v. People*, 87 Ill. 385.

sidered in applying the rule of limitation upon indebtedness.²³ The character of the obligation as a liability is not affected by the fact that it is not to be paid until some condition has been performed by the payee. Thus, where a city obligated itself to pay a sum of money upon the completion of a certain work, the court said: "It cannot be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed, and it could be compelled to do so if the work should be done according to contract."²⁴ In another case it was said:²⁵ "It is believed the constitution not only applies to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends on some contingency before a liability is created. But it must appear that such contingency is sure to take place irrespective of any action taken or option exercised by the city in the future. That is, if a present indebtedness is incurred, or obligations assumed, which without further action on the part of the city has the effect to create such an indebtedness at some future day, such are within the inhibition of the constitution. But if the fact of the indebtedness depends upon some act of the city, or upon its volition, to be exercised or determined at some future date, then no present indebtedness is incurred, and none will be until the period arrives and the required act or option is exercised, and from that time only can it be said there exists an indebtedness."

§ 251. Contracts requiring annual payments.—Some very difficult questions have arisen under these limitations upon indebtedness in connection with contracts which require the corporation to pay a fixed annual or monthly sum during a period of years for water, lighting, the disposal of sewage and such other purposes. Many of the authorities are in conflict with the principles stated in the preceding section. But careful atten-

²³ *La Porte v. Gamewell F. A.* (with elaborate note on what constitutes indebtedness).
Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359.

²⁴ *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Springfield v. Edwards*, 84 Ill. 626; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 44 Am. St. R. 222, 23 L. R. A. 402

²⁵ *Burlington Water Co. v. Woodward*, 49 Iowa, 58, at 62. But see *Keihl v. City of South Bend*, 76 Fed. 921, 36 L. R. A. 228; *People v. Arguello*, 37 Cal. 524; *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958.

tion must be given the particular charter under consideration, as the right may be determined by constitutional provisions relating to taxation and appropriations. The supreme court of Michigan said:²⁶ "There can be no doubt, in our opinion, that this whole contract obligation is a liability to the full extent of the thirty years' rental. And it is equally clear that all unpaid sums will be aggregated until paid." The contract was therefore held void. The same conclusion has been reached in Ohio,²⁷ New Jersey,²⁸ Oregon,²⁹ Montana,³⁰ Minnesota,³¹ and Pennsylvania.³² On the other hand, Illinois,³³ Massachusetts,³⁴ Iowa,³⁵ New York,³⁶ Indiana,³⁷ Oklahoma,³⁸ California³⁹ and Missouri⁴⁰ hold such contracts not in violation of the prohibition.

²⁶ *Niles W. W. v. Niles*, 59 Mich. 31, 26 N. W. 525.

²⁷ *State v. Medbery*, 7 Ohio St. 523.

²⁸ *Atlantic City W. W. v. Read*, 49 N. J. L. 558, 50 N. J. L. 665, 9 Atl. 759.

²⁹ *Salem W. W. v. Salem*, 5 Oreg. 29; *Brockway v. Roseburg*, 46 Oreg. 77, 79 Pac. 335.

³⁰ *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *State v. Helena*, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336.

³¹ *Kilchli v. Minn. Brush Electric Co.*, 58 Minn. 418, 59 N. W. 1088.

³² *In re Erie's Appeal*, 91 Pa. St. 398; *Wade v. Oakmont Borough*, 165 Pa. St. 479; *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854.

³³ *East St. Louis v. East St. Louis Gas L. Co.*, 98 Ill. 415, 38 Am. Rep. 97. But see *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *B. & O., etc. R. Co. v. People*, 200 Ill. 541. Illinois has apparently adopted the other rule.

³⁴ *Smith v. Dedham*, 144 Mass. 177.

³⁵ *Grant v. Davenport*, 36 Iowa, 396.

³⁶ *Weston v. Syracuse*, 17 N. Y. 110.

³⁷ *La Porte v. Gamewell F. A. Tel. Co.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208. See *Indianapolis v. Wann*, 144 Ind. 175, 4 N. E. 901, 31 L. R. A. 743.

³⁸ *Territory v. Oklahoma*, 2 Okla. 158, 37 Pac. 1094.

³⁹ *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 5 Am. St. R. 191, 31 L. R. A. 794; *Doland v. Clark*, 143 Cal. 116, 76 Pac. 958.

⁴⁰ *Lamar Water & E. L. Co. v. City of Lamar*, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157. In *Saleno v. City of Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. R. 653, the court said: "In construing words used in that instrument, in the absence of some restriction placed upon their meaning, they must be given such meaning as is generally accorded to them. A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which

"We base our views," says the supreme court of California, "upon the conviction that at the time of entering into the contract no debt or liability is created for the aggregate amount of the instalments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed." Where a city contracted for a fire-alarm system at a time when it was indebted beyond the constitutional limit and had no money in the treasury at the time when the contract was made or the work accepted, the contract was held to create a liability within the prohibition, notwithstanding the fact that there was money in the treasury at the time fixed for payment.⁴¹

§ 252. Anticipation of revenues.—In some states a municipality which has reached its constitutional limit of indebtedness is permitted to anticipate the collection of the revenues appropriated to its use by drawing warrants against taxes levied but not collected. The result is a substantial appropriation and as-

may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and if not furnished, no payment could be required." "The weight of the decisions, and which we regard to be the proper view of the question, is that such a contract is not prohibited, even if the total amount which the corporation will have to pay will, with the other debts of the municipality, exceed the statutory or constitutional limitations. Only the annual payment of the year when the calculation is made should be considered as a debt." *Simonton, Municipal Bonds*, § 60.

⁴¹ In *La Porte v. Gamewell F. A. Tel. Co.*, *supra*, the court said: "When a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebt-

edness for the aggregate sum of the instalments, since the debt for each year or month does not come into existence until it is earned. The earning of each year's or month's compensation is essential to the existence of the debt. If the city can pay this indebtedness when it comes into existence, without exceeding the constitutional limit, there is no indebtedness, and therefore no violation of the constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay said indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and there is a violation of the constitution." *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. 957; *Keihl v. City of South Bend*, 76 Fed. 921, 36 L. R. A. 228.

signment of the amount drawn to the holder of the warrant. In order that such warrants may not increase the indebtedness of the municipality it is necessary that the tax should not only be levied but that the warrant be drawn on the particular fund and be in legal effect sufficient to discharge the city.⁴²

⁴² Ash v. Parkinson, 5 Nev. 15; v. Davenport, 36 Iowa, 396; Shan-
Springfield v. Edwards, 84 Ill. 626; non v. Huron, 9 S. D. 356, 69 N. W.
Law v. People, 87 Ill. 385; French 598; Dively v. Cedar Falls, 27
v. Burlington, 42 Iowa, 614; Grant Iowa, 227.

CHAPTER XIX.

LEGISLATIVE CONTROL OVER PUBLIC CORPORATIONS.

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§ 253. Legislative power over charters.—In considering the extent of legislative power over public corporations, it must be remembered that such power is subject to the constitutional limitations upon legislative action in general, both as to substance and manner of execution. Constitutional provisions regarding general and special laws, titles of acts, and the like, must, as a matter of course, be observed in legislation with reference to public corporations as well as in all other cases. But, from the fact that such corporations are created by the legislature for govern-

mental purposes, and that their rights rest on legislation and not on contract, it follows that the legislative control over the charters of such bodies is practically absolute unless restricted by express or implied constitutional limitations. That is, unless there is an express limitation upon the general power of the legislature, it may create, change or abolish public corporations with or without the consent of the inhabitants.¹ The legislature may, however, submit the question of the acceptance of an amendment to its charter to the people, although it is under no obligation to do so.² The fact that a city charter is recognized in the constitution of the state does not necessarily place it beyond the control of the legislature.³ The annexation of territory to a city is not an amendment of its charter.⁴

§ 254. Right to local self-government.—Although the absolute power of the legislature over the constituent statutes of governmental corporations which are purely state agencies, such as counties,⁵ is almost universally conceded, there has been some difference of opinion in respect to municipal corporations. A

¹ *St. Louis v. Russell*, 9 Mo. 508; *St. Louis v. Allen*, 13 Mo. 400; *Dartmouth College v. Woodward*, 4 Wheaton, 518; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *People v. Bennett*, 29 Mich. 451; *Wallace v. Trustees*, 84 N. C. 164; *State v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *North Yarmouth v. Skilling*, 45 Me. 133, 71 Am. Dec. 530; *Claghorn v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450, cases cited on page 470 of note; *Smith v. Wescott*, 17 R. I. 366, 13 L. R. A. 217; *Meriwether v. Garrett*, 102 U. S. 472; *Broughton v. Pensacola*, 93 U. S. 266.

² *People v. Nally*, 49 Cal. 478; *Foote v. Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737.

³ *Mayor of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572, and note.

⁴ *State v. Warner*, 4 Wash. 263, 17 L. R. A. 263.

⁵ A county organization is created almost exclusively with a view to the policy of the state at large for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy." *Treadway v. Schnauber*, 1 Dak. 233; *Hamlin v. Meadville*, 6 Neb. 227; *Talbot Co. v. Queen Anne Co.*, 50 Md. 245; *Hannibal v. Marion Co.*, 69 Mo. 571.

few courts have asserted a right in the inhabitants of cities and towns to some form of organization for self-government, and have denied the power of the legislature to take away from them all discretion as to municipal matters and exercise that discretion itself or provide for either its exercise or its execution by state-appointed officers. In a leading Michigan case,⁶ a legislature, in a special statute, had appointed certain persons a board of public works for the city of Detroit, and provided that the board should have charge of the city's buildings, property, and local conveniences, should make city contracts, and do many things of a legislative kind which are usually entrusted to a city council. The court declared the statute inoperative, holding that the inhabitants had a constitutional right to self-government in respect to local affairs—a right founded on the customs of the English race impliedly confirmed by our constitutions, which forbids that the state should assume control in such matters. This rule has been adhered to in Michigan,⁷ and sanctioned in several other states.⁸

By other strong authorities, on the other hand, it is held that, without special constitutional provision, all power of local self-

⁶ *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

⁷ (Park) *People v. Detroit Common Council*, 28 Mich. 228, 15 Am. Rep. 203; (drains; county) *Attorney General v. McClear*, 146 Mich. 45; (roads; county) *Wayne Co. Road Commrs. v. Auditors*, 148 Mich. 255; (fire department) *Davidson v. Hine*, 151 Mich. 294. In *People v. Detroit Common Council*, *supra*, Cooley, J., said: "Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of a local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and natural persons." But this is a most extreme view.

The chief difficulty in the way of asserting that the inhabitants of localities have a constitutional

right to powers of local self-government was recognized by the same learned judge in the same opinion: "While it is a fundamental principle in the state, recognized and perpetuated by express provisions of the constitution, that the people of every hamlet, town and city of the state are entitled to the benefits of local self-government, the constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state, from considerations of good policy as well as those which pertain to the local benefit and local desires."

⁸ *State ex rel Jameson v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 65; *State ex rel Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 79; *People v. Coler*, 166 N. Y. 1,

government is held subject to the will of the legislature; that a legislature may direct the action of a city or town in local matters, and may provide for the appointment of municipal officers by the state.⁹ In some states, however, the constitutions prohibit the legislatures from taxing municipalities compulsorily for local purposes, and permit it to vest the power to do so only in the "corporate authorities" of cities and towns, which term is taken to mean either the local electorate, a local representative body, or an agency appointed in any mode to which the inhabitants have voted their assent.¹⁰

In New York, the Michigan rule as regards the appointment of officers is adopted by constitution, which provides that "all city, town and village officers, whose election or appointment is not provided for by the constitution, shall be elected by the electors of such cities, towns or villages, or appointed by such authorities thereof as the legislature thereof shall designate."¹¹ This provision was held to secure to the citizens of the municipalities immunity from legislative interference with the election or appointment of purely municipal officers;¹² but not to prevent the appointment by the legislature of commissioners for the improvement of the streets of a city.¹³

at 12, 59 N. E. 716. *In re Mayor*, 182 N. Y. 361, at 366, 75 N. E. 156; *People v. Tax Commrs.* 174 N. Y. 417, 67 N. E. 69; *ex parte Corliss*, (N. Dak. 1907), 114 N. W. 962, collecting the authorities *pro* and *con*.

⁹ "We cannot declare an act of the legislature invalid because it abridges the privileges of self-government in a particular in regard to which such privilege is not guaranteed by the provisions of the constitution." *Comm. v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142; *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607; *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; (Galveston commission) *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488; *In re Senate Bill*, 12 Colo. 188; *Daley v. St. Paul*, 7 Minn. 390 (Gil. 311);

David v. Portland Water Committee, 14 Oregon, 98, 12 Pac. 174; see *State v. Barker*, 116 Ia. 96, 89 N. W. 204, and cases collected. For a discussion of the tendency toward depriving municipalities of the right of self-government, see Goodnow's *Municipal Problems*, p. 9; Bryce, *Am. Comw.*, I, p. 630, chapter on *Municipal Government*, contributed by Pres. Low of Columbia University.

¹⁰ *Supervisors v. People*, 110 Ill. 511, *Wetherell v. Devine*, 116 Ill. 631, 6 N. E. 24; *State v. Mayor, etc.*, 103 Ia. 76, 72 N. W. 639, and cases cited.

¹¹ Const. of N. Y., Art. 10, s. 2.

¹² *People v. Albertson*, 55 N. Y. 50.

¹³ *Astor v. New York*, 62 N. Y. 567.

§ 255. Legislative power over property.—The general limitation of the taxing power forbids that the legislature should appropriate property which has been acquired by means of local taxation to the use of a different community, or to that of the state at large.¹⁴ To do so would be in effect to tax one community for the use of a different one.

The more difficult question is how far the legislature can interfere with the legal title or direct the use of such property. Here the distinction between property held for state uses, such as that which has been dedicated to general public use, and that held for uses in which the state has no interest, becomes again prominent. As property of the former class is held by the local agency merely as an instrument of the state, its title and use are within the control of the legislature.¹⁵ Property of the latter class, such as markets, cemeteries, commons, water and light works, have been held to come within the constitutional provision which forbids the taking of private property without compensation or due process of law. The state cannot deprive the corporation of the title or control, or change the purpose for which the property is employed.¹⁶

Thus, where a city held certain real estate in fee-simple absolute, under ancient grants, and had at the expense of the citizens constructed reservoirs upon a portion of such real estate, it was held that the legislature had no power to require that the reservoir be destroyed and the land converted into a public park without compensation to the city.¹⁷

¹⁴ *State v. Haben*, 22 Wis. 629.

¹⁵ (Highways) *Clinton v. Railroad Co.*, 24 Iowa, 455; *State v. St. Louis Co. Court*, 34 Mo. 546. But how under the Michigan rule regarding right of local self-government. *Wayne Co. Road Commrs. v. Auditors*, 148 Mich. 255.

¹⁶ (Cemetery) *Prop. of Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695; (park) *Webb v. New York*, 64 How. Pr. 10; (bonds granted by the state) *Spaulding v. Andover*, 54 N. H. 38; *State v. Barker*, 116 Ia. 96, 89 N. W. 204, and cases cited.

¹⁷ *Webb v. Mayor*, 64 How. Pr. 10. "It seems to me," said McComber, J., "that the weight of authority is to the effect that the property which New York holds in its proprietary or private character, though originally derived from a power claiming the ultimate title, and which concerns the private advantage of the corporation as a distinct legal personality, is stamped with so many of the rights and powers of natural persons or private corporations as that the city cannot be deprived of this reservoir without due process of law and without just compensation.

It seems well settled that municipal corporations have, *as against the state*, a twofold character. They are endowed with certain functions and possess powers and capacities which are granted to them for the benefit of their own citizens, and which are distinct from those which they possess as agencies of the state government. These powers and capacities are commonly called private, in order to distinguish them from the public powers in which the state is more directly concerned. As regards such private powers and capacities, municipal corporations are substantially on the same footing as private corporations.¹⁸ Thus, when a municipal corporation supplies its inhabitants with gas or water, it is generally held to do so in its private corporate capacity, and not in the exercise of a power of local sovereignty.¹⁹ As said by the supreme court of Pennsylvania in a recent case:²⁰ "If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating the two powers * * * public and private, regard must be had to the object of the legislature in granting them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character; but if the grant

It admits of no doubt that the legislature may change, modify, enlarge or restrain the powers of a corporation which it has created. But whenever this is done, and a municipal corporation is relieved of the privilege and duty of maintaining a jurisdiction over the property and property rights, care has invariably been taken to restore to the original owner or proprietor the rights which the municipal corporation were for a time permitted to exercise. *Territt v. Taylor*, 9 Cranch, 52; 2 Kent, Com. 257." "The private property of a municipal corporation is protected by the constitution of the United States in the same manner and to the same extent as the property of an individual." *Grogan v. San Francisco*, 18 Cal.

590, per Field, Ch. J.; *Cooley*, Const. Lim. (7th ed.) 342.

¹⁸ *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271, 34 L. R. A. 518; *Safety I. Wire Co. v. Baltimore*, 66 Fed. 140; *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. 393, followed in *Commonwealth v. Philadelphia*, 132 Pa. St. 288; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519; *Board of Commissioners v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Philadelphia v. Fox*, 64 Pa. St. 180; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

¹⁹ But see *Fire Ins. Co. v. Keeseville*, 148 N. Y. 46.

²⁰ *Brumm's Appeal* (Pa. St.), 12 Atl. 855. See, also, *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519.

was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quo ad hoc* is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.”

Yet the legislature may, because of its power to make changes in the municipal organization, change the agencies which administer property of this class.²¹

§ 256. Roads and streets.—The legislature as the representative of the whole people may regulate the use of streets, highways and other such public places. The municipality has no property interest of a private nature in the streets even where it holds the title in fee. The title is held by the corporation as an agency of the public, and “is as directly under the power and control of the legislature for any public purpose as any property held by the state or any public body or officers, and its application cannot be challenged by a corporation which in respect to such property, at least, is a mere agent of the sovereign power of the people.”²² Hence, the legislature may transfer the control of the streets of a city to park commissioners, to be by them controlled as boulevards.²³

§ 257. Rights in the nature of franchises.—Public wharves and ferries are property in the nature of highways, dedicated to the use of the general public. Under modern views, if a city is authorized by a state legislature to establish a wharf or a ferry, it does so as a mere instrument of state government, for the benefit of the public at large. The power is not a franchise and may be revoked.²⁴

²¹ Mayor of Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Webb v. Mayor, 64 How. Pr. 10.

²² People v. Kerr, 27 N. Y. 188; Duval County Com. v. Jacksonville, 29 L. R. A. 416; State v. Jacksonville S. R. Co., 29 Fla. 590; Portland, etc. Ry. Co. v. Portland, 14 Oreg. 188, 12 Pac. 265; Council Bluffs v. K. C., etc. Ry. Co. 45 Iowa, 358; Chicago, etc. Ry. Co. v. Dunbar, 100 Ill. 110; Elliott,

Roads and Streets, § 656.

²³ People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135; Simon v. Northrup, 27 Oreg. 487, 30 L. R. A. 171.

²⁴ E. Hartford v. Hartford Bridge Co., 10 How. (U. S.) 511, s. c. 16 Conn. 149; Trustees v. Tatman, 13 Ill. 28. New Orleans M. & T. Co. v. Ellerman, 105 U. S. 166. In this case the court said: “Whatever powers the municipal body rightfully enjoys over the

But the right may have been acquired under a colonial charter, at a time when, even as respects a municipal corporation, it was considered a contractual grant. It has been held that, notwithstanding the establishment of a state government, such a right retains its original nature as a private franchise. But this is not clear. The property acquired thereunder, however, would be private as against the state.²⁵

§ 258. Disposition of property upon dissolution.—The power to amend or repeal the charter of a public corporation cannot be used to take away property rights, which have been acquired under the operation of a charter.²⁶ But this does not mean that the mere presence of property rights will prevent a repeal; but merely that upon dissolution the property must be administered with respect to the rights of those for whose benefit it has been acquired, or who have obtained an equitable right in it. If the corporation is holding property upon a public trust, and the effect of the alteration in its powers, or of the dissolution, is to leave the trust without a trustee, a court of equity will appoint a new trustee.²⁷ Upon dissolution, so much of the assets as are not public become subject to a charge for the benefit of the creditors. The private property of a public corporation is in

subject are derived from the legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation which it is allowed by law to charge for the actual use of the structures provided at its expense for the convenience of vessels engaged in the navigation of the river." *Cannon v. New Orleans*, 20 Wall. (U. S.) 577.

²⁵ *Benson v. Mayor*, 10 Barb. (N. Y.) 223. Compare, *Rober v. Mc-*

Whorter, 17 Va. 214. See *New Orleans, etc. Co. v. Ellerman*, *supra*.

²⁶ *The Sinking Fund Cases*, 99 U. S. 700; *Detroit v. Howell Plank Road Co.*, 43 Mich. 140.

²⁷ *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *Vidal v. Girard*, 2 How. (U. S.) 127; *Montpellier v. E. Montpellier*, 27 Vt. 704, 29 Vt. 12. As to the power to take and hold property in trust, see *Smith v. Wescott*, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217, and cases cited in note. The legislature may place the administration of trusts vested in the city in the hands of a board of trustees. *Philadelphia v. Fox*, 64 Pa. St. 169.

like manner stamped with a trust for the payment of its debts,²⁸ and cannot be diverted to other uses by the legislature.²⁹

I. POWER OVER OFFICES AND OFFICERS.

§ 259. Various kinds of officers.—The question of the legislative power to provide for the appointment of local officers by a state authority or other external agency is determined by the distinction between state and municipal functions. This distinction rests not upon the name or locality of the office, but upon the nature of the duties to be performed. If the duties of the office concern the state at large or the general public, although exercised within defined territorial limits, it is a state office, and under the absolute control of the legislature. But if such duties relate exclusively to the local concerns of a particular municipality, the office is strictly municipal, and any attempt on the part of the legislature to take from the corporation the power to elect or appoint such officer is an interference with the right of local self-government, under the Michigan rule,³⁰ and may be considered an interference with the rights of property of the municipality where that rule does not obtain.³¹ The authorities are not in harmony, however, as will appear in the following sections.

§ 260. Police officials.—The various kinds and grades of police officials, although ordinarily performing their duties and

²⁸ "If a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property, a court of equity will take possession of it for the benefit of the creditors of the corporation." *Broughton v. Pensacola*, 93 U. S. 266; *Mere-wether v. Garrett*, 102 U. S. 472.

²⁹ Hare, *Am. Const. Law*, p. 636, and cases cited.

³⁰ *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State ex rel Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *State v. Hunter*,

38 Kan. 578; *People v. Draper*, 15 N. Y. 532; *Attorney General v. Common Council of Detroit*, 112 Mich. 145, 70 N. W. 450. A member of a city council is not an officer of the ward from which he is chosen. He is a city officer. *State v. Craig*, 132 Ind. 54, 16 L. R. A. 688.

³¹ *State v. Barker*, 116 Ia. 96, 89 N. W. 204; *Proprietors of Mount Hope Cemetery v. Boston*, 158 Mass. 509. But see *Brown v. Galveston*, 97 Texas, 1, 75 S. W. 488.

exercising their powers within the limits of a single municipality, are state and not municipal officers.³²

§ 261. Their appointment and payment.—The legislature may provide a permanent police for a municipal corporation, and place it under control of a board composed of members appointed by the legislature or some other state authority, and require the transfer to such board of all station-houses belonging to the corporation.³³ As said by Chief Justice Elliott,³⁴ “The power of the legislature to provide for the appointment of the members of a municipal board of police has been affirmed in every instance in which it has been so challenged and presented as to require the judgment of courts. Those courts which hold to the doctrine that the control of matters of purely local concern cannot be taken from the people of the locality place their decisions upon

³² *Commonwealth v. Plaisted*, 148 Mass. 375; *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312; *Rusher v. Dallas*, 83 Tex. 151; *Culver v. Streator*, 130 Ill. 238, 22 N. E. 810; *Perkins v. New Haven*, 53 Conn. 214, 1 Atl. 845; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; *Burch v. Hardwicke*, 30 Grat. (Va.) 24; *State v. Seavey*, 22 Nev. 454; *State v. Hunter*, 38 Kan. 578. In this case the court said: “In effect, it is said to be opposed to the fundamental theory of self-government, and denies to the people of the district the right to select their own officers from among their own number. Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners who are chosen by state officers rather than through the electors of the cities, there can be no doubt that the legislature has the power to do so.” *State v. Seavey*, 22 Neb. 455, 467, 35 N. W. 228. “As a political society the state has an interest in the suppression of disorder and the maintenance of peace

and security in every locality within its limits.” Denio, J., in *People v. Draper*, 15 N. Y. 544; *People v. Mayor*, 15 Md. 376. In *Shad v. Crawford*, 3 Metc. (Ky.) 207, and *People v. Albertson*, 55 N. Y. 50, they were held to be local officers. The members of a board of health are state officers. *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *Taylor v. Philadelphia Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724. Jury commissioners are state officers. *Speed v. Detroit*, 100 Mich. 92, 58 N. W. 638.

³³ *Baltimore v. State*, 15 Md. 376; *People v. Mahaney*, 13 Mich. 481; *State v. Covington*, 29 Ohio St. 102; *State v. Seavey*, 22 Neb. 454, 35 N. W. 228; *State v. Hunter*, 38 Kan. 578; *State ex rel Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *State ex rel Jameson v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79. But see *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

³⁴ *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

the ground that the selection of purely peace officers is not a local matter, but is one of state concern, inasmuch as such officers belong to the constabulary of the state. But while the reasoning of the courts is diverse, the ultimate conclusion reached by all the cases is the same.” The maintenance of a police department is commonly left to municipal authority, but the legislature may establish a municipal board of police, with power to estimate the expense of such department and compel the municipality to provide by taxation for the payment of the amount so required.³⁵

§ 262. Park commissioners.—The legislature may create a board of park commissioners, with members to be elected by the people of the municipality, and confer on it authority to purchase a public park. But such commissioners are primarily municipal officers, exercising powers of a nature purely municipal. Under the Michigan rule, as decided in a leading case, a statute created a board and named the members and authorized it to select the land for a park and to make contracts therefor, subject to ratification by the city council and a vote of the people. Before the acts of the board were ratified the statute was amended, and the board authorized to “acquire by purchase” the necessary lands, and to require the council to provide the necessary money. It was held that the council could not be compelled to raise the money for such a local purpose, and that the fact that the council recognized the board as a municipal agent before the amendment did not make it the representative of the city with reference to powers conferred by the amendment.³⁶

But according to many authorities parks may be constructed by the state within a locality for the benefit of the public at large, the expense be defrayed by local taxation, and the management be vested in a board of state-appointed officers;³⁷ and obviously

³⁵ *People v. Mahaney*, 13 Mich. 481; *Burch v. Hardwicke*, 30 Grat. (Va.) 24; *Police Com'rs v. Louisville*, 3 Bush (Ky.), 597; *State v. Leovy*, 21 La. Ann. 538. In *People v. Albertson*, 55 N. Y. 50, the case of *People v. Draper*, 15 N. Y. 532, is distinguished, and *People v. Shepard*, 36 N. Y. 285, doubted.

328, 15 Am. Rep. 202; *Attorney-General v. Lathrop*, 24 Mich. 235; *Park Com. v. Mayor*, 29 Mich. 347, *contra* *Hartford v. Haslen*, 76 Conn. 599. See *St. Louis Co. v. Grisold*, 58 Mo. 175; *Astor v. Mayor*, 66 N. Y. 567.

³⁷ *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607; *Hartford v. Haslen*, 76 Conn. 599.

³⁶ *People v. Detroit*, 28 Mich.

parks established by dedication to the general public are within the control of the state.³⁸

§ 263. Other public works.—The courts of Michigan and Indiana have held that the legislature cannot provide for the external appointment of local officers who have the care of streets, roads and bridges.³⁹ But these authorities seem out of harmony with the rule that highways are established for the benefit of the public at large.

Under a constitutional provision which authorizes the legislature to confer upon cities and villages such powers of local legislative and administrative character as it shall deem proper, and provides that “judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such times and in such manner as the legislature may direct,” the legislature may appoint officers not municipal, such as police commissioners; but according to the Michigan rule it cannot appoint officers whose duties are exclusively local, such as the members of a board of water commissioners for a particular city.⁴⁰

§ 264. The mayor.—The chief executive officer of a city has been held to be a municipal and not a state officer.⁴¹ But in a recent well-considered case,⁴² it was held that the mayor was a state officer, within the meaning of a constitutional provision to the effect that no person holding an office under the state shall at the same time hold the office of governor. The court said:

³⁸ *In re* Land in Laurence, 119 Fed. 453.

³⁹ *State ex rel* Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *State v. Smith*, 44 Ohio St. 348; *Wayne Co. Road Commrs. v. Auditors*, 148 Mich. 255. *Contra*, *Daley v. St. Paul*, 7 Minn. 390.

⁴⁰ *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103. *Contra*, *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174. The constitution of Colorado, article 5, section 25, which provides that the legislature “shall not delegate to any special commission, private corporation or association, any power

to make, supervise or interfere with any municipal improvement, money, property or effects, or perform any municipal functions whatever,” does not prevent the legislature creating a board of public works for the city of Denver charged with the making of public improvements, composed of members appointed by the governor by and with the advice and consent of the senate. *In re* Senate Bill, 12 Colo. 188.

⁴¹ *Britton v. Steber*, 62 Mo. 370.

⁴² *Attorney General v. Common Council of Detroit*, 112 Mich. 145, 70 N. W. 450.

“Many cases have arisen upon similar provisions of the various constitutions, and while the decisions are not altogether uniform, we shall find them in substantial harmony upon two propositions, viz.: First, that an officer of a city, whose duties are purely and simply municipal, and who has no functions pertaining to state affairs, does not come within the constitutional description of officers holding office under the state. And second, where officers in cities are appointed or elected by the community in obedience to laws which impose duties upon them in relation to state affairs, as contradistinguished from affairs of interest to the city merely, such as relate to gas-works, sewers, water-works, lighting, etc., they are upon a different footing, and may properly be said to hold office under the state.”

II. FUNDS AND REVENUES.

§ 265. Power over revenue of public corporations.—The legislature has full power of disposition over such funds and revenues of a city, county, township, or other public corporation, as are derived from the exercise of the taxing power or the police power of government; ⁴³ provided they have not been appropriated under legal authority to some corporate purpose which is private as against the state, and provided that, if raised by local taxation, the purpose to which the legislature seeks to devote them is one for which a local tax might originally have been laid.⁴⁴

The funds and revenues of a county raised by taxation are not its property in the sense in which private property belongs to an individual. They are the result of the use of a power delegated

⁴³ *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *County v. People*, 11 Ill. 202; *County of Richland v. County of Lawrence*, 12 Ill. 1; *Trustees v. Tatam*, 13 Ill. 28; *Dennis v. Maynard*, 15 Ill. 477; *People v. Power*, 25 Ill. 169; *Love v. Schenck*, 12 Ired. (N. C.) 304; *Youngs v. Hall*, 9 Nev. 212; *Indianapolis v. Indianapolis Home, etc.*, 50 Ind. 215; *Duval Co. Com. v. Jacksonville*, (Fla.), 29 L. R. A. 416, 18 So. 339; *Creighton v. San Francisco*, 42 Cal. 446.

Misappropriation of funds—Action—When the funds of the county or city are misappropriated, an action to recover the same must be brought in the name of the municipality. *People v. Ingersoll*, 58 N. Y. 1; *People v. Fields*, 58 N. Y. 491; *Love v. Schenck*, 12 Ired. (N. C.) 304; *Dennis v. Maynard*, 15 Ill. 477; *Spaulding v. Andover*, 54 N. H. 38. See *Trustees of Aberdeen Academy v. Aberdeen*, 13 S. & M. (Miss.) 645.

⁴⁴ *State v. Haben*, 22 Wis. 629.

by the state to be exercised for the public good, and the public interest requires that the legislature shall have power to direct and control their application.⁴⁵ Hence, until actually appropriated, the public funds are subject to the control of the legislature. Thus, no vested rights are acquired in a fund set apart for the relief of disabled officers. "The direction of the state," said Mr. Justice Field,⁴⁶ "that the fund should be for the benefit of the police officer or his representatives, under certain conditions, was subject to change or revocation at any time at the will of the legislature. There was no contract on the part of the state that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment."

Where the constitution of the state prohibited the legislature from authorizing counties to levy taxes for any other than county purposes, it was held that the legislature might nevertheless require the county to turn over a certain portion of a tax levied for county purposes to a municipality to be used in repairing the streets of a city.⁴⁷

§ 266. From rights in the nature of franchises.—Neither public corporations nor their officers or agents⁴⁸ can acquire vested rights in the powers which are conferred upon them. "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right as against the government in any individual or body of men."⁴⁹ Such power exists subject to the will of the legislature, and in the absence of a constitutional limitation may be repealed or withdrawn either by general law or special statute.⁵⁰ Thus, the legislature may repeal a grant of power to levy and collect wharfage, although the income of the wharf has been pledged by the corporation along with other revenues for the payment of bonds issued

⁴⁵ *Board v. City of Springfield*, 63 Ill. 66; *Police Commrs. v. St. Louis Co. Ct.*, 34 Mo. 546.

⁴⁶ *Pennie v. Reis*, 132 U. S. 464.

⁴⁷ *Duval Co. Com. v. Jacksonville, (Fla.)*, 18 So. 339, 29 L. R. A. 416; *Skinner v. Henderson*, 26 Fla. 121, 8 L. R. A. 55.

⁴⁸ *People v. Hurlbut*, 24 Mich. 44.

⁴⁹ *People v. Morris*, 13 Wend. 335, Nelson, J.

⁵⁰ *Sloan v. State*, 8 Blackf. (Ind.) 361; *State v. Kolsen*, 130 Ind. 434, 14 L. R. A. 566.

in order to obtain money to maintain and improve the wharf.⁵¹ So, it may repeal a statute which gives to a city the right to license the sale of intoxicating liquors, and provides that the money received from such licenses shall be appropriated to the support of paupers within the city.⁵² "Such authority," said Caton, J.,⁵³ "gives the city no more a vested right to issue licenses because the legislature specified the object to which the money should be applied, than if it had been put into the general fund of the city."

III. LEGISLATIVE CONTROL OVER CONTRACTS.

§ 267. Rights of parties contracting with corporation.—In the exercise of the general power of control over the corporation, the legislature must not impair any of the constitutional rights of third persons who have become creditors of the corporation. The corporation itself may not acquire rights as against its creator in many cases; but its transactions may give rise to contracts in which its creditors are protected by the constitutional provision against a state's impairing the obligation of a contract.⁵⁴

§ 268. Illustrations.—Where a public corporation has been given authority to incur indebtedness, and to levy a tax for the purpose of providing the means to pay the debt, parties who become creditors of the corporation upon the faith of this taxing power are presumed to have contracted with reference to the means of payment thus provided, and the legislature cannot destroy their remedy by depriving the municipality of the right to levy the tax. The power of taxation as it existed at the date of the contract is read into the contract and becomes a part of the

⁵¹ *St. Louis v. Shields*, 52 Mo. 351. Distinguishing *Van Hoffman v. Quincy*, 4 Wall. 535. Observe that in *St. Louis v. Shields*, the question was only as to the right of the city to resist; the rights of the bondholders were not before the court.

⁵² *Gutzweiler v. People*, 14 Ill. 142; *People v. Morris*, *supra*.

⁵³ See *Richmond Co. v. Lawrence Co.*, 12 Ill. 1; *Sangamon v. Springfield*, 63 Ill. 66.

⁵⁴ *Shapleigh v. San Angelo*, 167

U. S. 654; *Wolff v. New Orleans*, 103 U. S. 358; *Williams' Appeal*, 72 Pa. St. 215; *Memphis v. United States*, 97 U. S. 203; *Van Hoffman v. Quincy*, 4 Wall. 536; *Morris v. State*, 62 Tex. 728; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Merriweather v. Garrett*, 102 U. S. 472; *Lansing v. County Treasurer*, 1 Dill. C. C. 522; *People v. Bond*, 10 Cal. 563; *Smith v. Appleton*, 19 Wis. 468.

obligation.⁵⁵ The rights of creditors can no more be impaired by amendment of a state constitution than by the repeal of the statute authorizing the levying of the tax.⁵⁶ Subsequent changes which substantially modify the manner of levying the tax, so as to affect rights under the contract, violate the rule against the impairment of contracts.⁵⁷ But an alteration in the manner of levying such tax, which does not substantially affect the security of the creditor, is valid.⁵⁸ So, exempting certain property from the operation of the tax is not objectionable, when not carried to such an extent as to affect the substantial rights of the creditors.⁵⁹

§ 269. Rights in a sinking fund.—The creditors of a public corporation may acquire contract rights in a fund which is raised for the payment of their debt, and upon the faith of which they have acted. Thus, where certain creditors surrendered their claims against the city, and accepted new obligations upon a pledge that certain revenues and property should be applied to the payment of such new obligations in a specific manner, the security thus provided for cannot be diverted to other purposes by either the municipality or the legislature. The provision for payment thus made becomes a part of the contract, and cannot be materially altered without the consent of such creditors.⁶⁰ So, where an act of a legislature provides for the creation of a sinking fund, which is to be deposited and applied in a certain manner, and creditors acting on the faith of such provision for the payment of their debts surrender their obligations and receive new

⁵⁵ *Nelson v. St. Martin's Parish*, 111 U. S. 716; *Wolff v. New Orleans*, 103 U. S. 358; *Louisiana v. Pilsbury*, 105 U. S. 278; *Ralls Co. Court v. United States*, 105 U. S. 733; *Mobile v. Watson*, 116 U. S. 289; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Gilman v. Sheboygan*, 2 Black, 510; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321; *State v. New Orleans*, 37 La. Ann. 13.

⁵⁶ *Sawyer v. Concordia*, 12 Fed. Rep. 754.

⁵⁷ *Selbert v. Lewis*, 122 U. S. 284.

⁵⁸ *People v. Bond*, 10 Cal. 563.

⁵⁹ *Gilman v. Sheboygan*, 2 Black, 510; *Selbert v. Lewis*, 122 U. S. 284. The rights of a contractor, who has agreed to take his compensation in assessments, cannot be destroyed by a subsequent statute restricting the power of assessment. *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

⁶⁰ *People v. Bond*, 10 Cal. 563. As to the nature of a sinking fund, see *Kelly v. City of Minneapolis*, 63 Minn. 125, 30 L. R. A. 281, 65 N. W. 115.

bonds for the payment of which the fund is pledged, the legislature cannot, by subsequent act, provide for a different depository of the fund.⁶¹ It may be stated as a general rule that such provisions as were intended to, and probably did, operate as an inducement to the creditors to accept the new security, cannot subsequently be modified to the prejudice of the creditors.

§ 270. Limitation on indebtedness.—Where a city was authorized to issue a certain amount of bonds in payment for an equal amount then outstanding, and a provision of the act prohibited the city from thereafter issuing its bonds “except in payment of its bonded debts,” it was held that, after the creditors had accepted this proposition, the prohibition against the issue of additional bonds became a contract between the municipality and the bondholders, which was impaired by subsequent legislation authorizing the issue of bonds for other purposes.⁶²

§ 271. Power to deprive a municipality of contract rights.—The power of the legislature to deprive a municipality of contractual rights against third persons is determined with reference to the same distinction as is recognized in respect to property. A legislature has absolute control of an obligation in favor of a public corporation, which has been acquired by the corporation as an agent of the state; for example, may release the contract obligation of a street-railway company to repair streets.⁶³

IV. THE POWER TO IMPOSE OBLIGATIONS.

§ 272. Nature of the debt.—Where a debt or liability would arise out of the performance of a public duty, and is to be incurred for public or state purposes, the legislature may impose the same upon the corporation without its consent. The question can seldom arise in reference to public corporations other than municipal, and the power is frequently restricted by constitutional provisions. In the absence of such provisions, the question whether a city can be compelled by an act of the legislature to

⁶¹ *The Liquidators v. Municipality*, 6 La. Ann. 21.

⁶² *Smith v. Appleton*, 19 Wis. 468.

⁶³ *Springfield v. Springfield*

Street Ry. Co., 182 Mass. 41, 64 N. E. 577. See *State v. Baltimore & Ohio R. Co.*, 25 Md. (12 G. & J.) 279.

incur a debt or assume a liability against its will must be determined by the nature of the purpose for which such liability is to be incurred.⁶⁴ A city may be compelled to pay a debt even in excess of a statutory limit upon indebtedness;⁶⁵ but otherwise when the limitation is imposed by the constitution.⁶⁶ The legislature cannot, however, require a court to render judgment upon a claim against a corporation upon mere proof of the amount of the claim, as this would be an attempt to control the judicial power.⁶⁷

§ 273. Compulsory taxation.—The state may direct and levy compulsory taxation whenever necessary to compel a public corporation to perform its duties as an agency of the state government, or to fulfill any legal or equitable obligation resting upon it in consequence of any corporate action. The people have no absolute right to be heard except through their representative in the legislature of the state.⁶⁸

§ 274. Construction of highways.—The control of public highways, bridges and canals is a matter of general, or state, as distinguished from municipal concern, and the legislature may require a municipal corporation to build and maintain a bridge over a stream within its limits,⁶⁹ or to expend money for the im-

⁶⁴ *Simon v. Northup*, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; *Lycoming v. Union*, 15 Pa. St. 166, 53 Am. Dec. 575.

⁶⁵ *Mosher v. School District*, 44 Iowa, 122.

⁶⁶ *Creighton v. San Francisco*, 42 Cal. 446; *New Orleans v. Clark*, 95 U. S. 644.

⁶⁷ *Hoagland v. Sacramento*, 52 Cal. 142.

⁶⁸ *Cooley*, Taxation, 684, 1 Andrews, Am. Law, § 411; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

⁶⁹ *Simon v. Northup*, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171; *Philadelphia v. Field*, 58 Pa. St. 320; *Thomas v. Leland*, 24 Wend. 65; *Guilder v. Otsego*, 20 Minn. 74; *Pumphrey v. Baltimore*, 47 Md. 145. A county may be compelled

to contribute toward the erection and maintenance of a bridge situated in another county. *Carter v. Bridge Proprietors*, 104 Mass. 236; *Commonwealth v. Newburyport*, 103 Mass. 129. "The general rule that bridges and highways shall be maintained by the counties and towns within which they are situated originated in the legislature, and the power that established it can repeal or modify it." Chapman, C. J., in *Carter v. Bridge Proprietors*, *supra*. The legislature may charge the cost of an authorized public improvement upon the particular public corporation chiefly benefited. *Norwich v. Hampshire*, 13 Pick. (Mass.) 60; *H., etc. v. Norfolk Co.*, 6 Allen (Mass.), 353.

provement of docks, wharves or levees.⁷⁰ So a county or town may be compelled to issue bonds for the purpose of raising money to be expended in the construction and maintenance of highways within its limits.⁷¹ In some states this duty to maintain streets and highways may be enforced by *mandamus* at the instance of a private person, without showing injury or interest.⁷²

§ 275. Support of public schools.—Where the state has established a system of public schools, it may by compulsory taxation compel the proper political division of the county to maintain the same. Such schools concern the state at large, and the unrestricted control by the legislature in no way conflicts with the privilege of local self-government.⁷³ So, it is competent for the legislature to provide for the distribution of money raised by taxation for school purposes after it has been collected.⁷⁴

§ 276. Local corporate purpose.—As the power to impose a debt is the power to tax, in the absence of special constitutional provision regarding compulsory local taxation, the question whether a legislature can impose a debt on a municipal corporation for an improvement of simply local interest depends on whether a right to self-government in such matters is recognized, as above discussed.⁷⁵

§ 277. Subscription for stock.—A public corporation is deemed to act in a matter of strictly corporate interest when it becomes a stockholder in a railway company; and a mandatory statute enacted without the consent of the inhabitants of the town, requiring the corporation to become a shareholder in a

⁷⁰ *Eastern, etc. Ry. Co. v. Central Ry. Co.*, 52 N. J. L. 267, 31 Am. & Eng. Corp. Cas. 262.

⁷¹ *People v. Flagg*, 46 N. Y. 401; *Jensen v. Board of Supervisors*, 47 Wis. 298; *People v. Board of Supervisors*, 50 Cal. 561. May impose a tax to pay for the construction of a canal. *Thomas v. Leland*, 24 Wend. 65.

⁷² *Pumphrey v. Baltimore*, 47 Md. 145.

⁷³ *State v. Haworth*, 122 Ind. 462, 23 N. E. 946; *State v. Blue*, 122 Ind. 600, 23 N. E. 963.

⁷⁴ *School District v. Weber*, 75 Mo. 558; *State Board of Education v. Aberdeen*, 56 Miss. 518.

⁷⁵ *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Cairo, etc. R. Co. v. Sparta*, 77 Ill. 505; *Marshall v. Silliman*, 61 Ill. 225; *People v. Batchelor*, 53 N. Y. 128, 13 Am. Rep. 480; *People v. Harper*, 91 Ill. 357; *Atkins v. Town of Randolph*, 31 Vt. 226. Compare *State v. Tappan*, 29 Wis. 669.

private corporation by exchanging its bonds for stock upon the terms prescribed by the statute, is invalid.⁷⁶

§ 278. Compulsory payment of claims.—The legislature may use the power of compulsory taxation to compel a public corporation, which exists and exercises authority by its permission, to pay a debt which is equitable in its character and involves a moral obligation, although not binding in strict law, and not enforceable in law or equity.⁷⁷ “The sovereign power of appropriation of the public funds already in the treasury, or to be raised by taxation, in favor of individuals, is one, the exercise of which must depend largely upon the legislative conscience, and, like most of the great powers of government, cannot be interfered with by us, unless in exceptional cases. The most usual cases in which this power has been exercised are those like the one under consideration now, where an individual, having no legal claim in the sense of being capable of enforcement by judicial proceedings against a municipal government, has, nevertheless, in equity and justice, in the larger sense of those terms, a right to indemnity and compensation out of the public treasury.”⁷⁸

⁷⁶ *People v. Batchelor*, 53 N. Y. 128. See opinion of Grover, J., reviewing the authorities. But see *United States v. Railroad Co.*, 17 Wall. 322. In *People v. Kelly* (Brooklyn and New York Bridge Case), 5 Abb. New Cas. 383, it was held that the erection of a bridge to connect the two cities was a city purpose, for which indebtedness might be incurred.

⁷⁷ *New Orleans v. Clark*, 95 U. S. 644; *Blandin v. Burr*, 13 Cal. 343; *Gulford v. Supervisors*, 18 Barb. 615, 13 N. Y. 144; *Brewster v. Syracuse*, 19 N. Y. 116; *Thomas v. Leland*, 24 Wend. 65; *People v. Supervisors*, 70 N. Y. 228; *Cole v. State*, 102 N. Y. 48, 6 N. E. 277; *O'Hara v. State*, 19 N. E. 659, 112 N. Y. 146. “The legislature may determine what moneys they may raise and spend, and what taxation for municipal purposes may be im-

posed; and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest upon.” *Mayor, etc. of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *Wrought Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204; *Lycoming v. Union*, 15 Pa. St. 166; *Hasbrouck v. Milwaukee*, 21 Wis. 219; *Grogan v. San Francisco*, 18 Cal. 590; *Sinton v. Ashbury*, 41 Cal. 525; *Creighton v. San Francisco*, 42 Cal. 446; *Nevada v. Hampton*, 13 Nev. 441. Contrast, *Hoagland v. Sacramento*, 52 Cal. 142.

⁷⁸ *Creighton v. San Francisco*, 42 Cal. 446; *Gulford v. Supervisors*, 18 Barb. 615; *Vassar v. George*, 47 Miss. 713. The liability of this power to abuse is pointed out by Mr. Justice O'Brien, in *Matter of Cullen*, 53 Hun (N. Y.)

In a leading case in New York⁷⁹ it was held that the legislature might legally levy a tax upon the taxable property of a town, and appropriate the same to the payment of a claim made by an individual against the town, although the claim had been expressly rejected by the voters of the town at an election authorized by an act of the legislature, and which declared that their action should be final and conclusive. This case, although carrying the doctrine of legislative power to the farthest limit, has been generally approved, although it has met with criticism by courts of high standing. It may be defended, says Judge Cooley,⁸⁰ upon the ground that it is the right and duty of the state to see that the powers it confers are not abused to the injury of those who have relied upon them, and that when a political corporation has contracted a debt or incurred an obligation, it has already taken the initiatory step in taxation; and has in effect given its consent that the subsequent steps, so far as they may be essential to the discharge of such debt or debts, may be taken.

But in Wisconsin an act of the legislature compelling the taxation of a town to pay for a bounty to a volunteer and the expenses of an unsuccessful suit to recover the same was held invalid on the ground that it was not for a legitimate public purpose.⁸¹

V. THE TERRITORY AND BOUNDARIES.

§ 279. The general rule.—Unless restricted by the constitution, the legislature has general power to determine⁸² and alter

534. As to the right of the corporation to an ordinary trial, see Cooley, *Taxation*, p. 687; *Sanborn v. Rice Co.*, 9 Minn. 273; *State v. Tappan*, 29 Wis. 664; *Plimpton v. Somerset*, 33 Vt. 283; *In re Pennsylvania Hall*, 5 Pa. St. 204.

⁷⁹ *Guilford v. Supervisors*, 18 Barb. 615; also 13 N. Y. 143; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Mayor of Brooklyn*, 4 N. Y. 419; *Thomas v. Leland*, 24 Wend. 65 (1840); *People v. Dayton*, 55 N. Y. 367 (1874); *Guilford v. Supervisors*, followed in *Blandin v. Burr*, 13 Cal. 343 (1859); *N. Mo. R. R. Co. v. McGuire*, 49 Mo. 490 (1872). Criticised in *Welsh-*

mer v. Village of Douglas, 64 N. Y. 91, 21 Am. Rep. 586. Approved, *arguendo*, in *United States v. Baltimore & Ohio R. R. Co.*, 17 Wall. 322 (1872); *New Orleans v. Clark*, 95 U. S. 654 (1877). Same principle affirmed in Massachusetts in *Carter v. Bridge Proprietors*, 104 Mass. 236 (1870). See, also, Cooley, *Const. Lim.* (7th ed.) 333-340 and notes.

⁸⁰ Cooley, *Taxation* (2d ed.), 685.

⁸¹ *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

⁸² *Roane v. Anderson*, 89 Tenn. 259; *Washburn v. Oshkosh*, 60 Wis. 453.

the territorial limits and boundaries of all public corporations.⁸³ After the territorial limits are once determined, it may “annex or authorize the annexation of the contiguous or other territory; and this without the consent, or even against the remonstrance, of the majority of the persons residing in the corporations or on the annexed territory.”⁸⁴ But some limitations have been placed by the courts upon this general power. Thus, it has been held that non-contiguous territory cannot be annexed;⁸⁵ and that an unoccupied tract of country cannot be made a part of a village for the mere purpose of increasing the village revenue.⁸⁶ As said in a recent well-considered case,⁸⁷ the legislature has power to extend the boundaries and thus enlarge the territorial limits of a city or town; but such acts are to be interpreted and applied according to the essential nature as well as the subject-matter of the legislation. “Territory not in fact connected with or adjacent to a city cannot be regarded as a part of a municipal corporation, or as an addition thereto, in any true sense of the term.” It was consequently held that the legislature had not the power to extend or enlarge the limits of a specially chartered town or city by adding thereto non-contiguous lands,—that is, lands entirely separated from the municipality by intervening territory. The power to annex territory may be delegated to a municipality,⁸⁸

⁸³ *Blanchard v. Bissell*, 11 Ohio St. 96; *Winona v. School District*, 40 Minn. 13, 3 L. R. A. 45; *State v. Lake City*, 25 Minn. 404; *Galesburg v. Hawkinson*, 75 Ill. 152; *Martin v. Dicks*, 52 Miss. 53, 24 Am. Rep. 661; *Daly v. Morgan*, 69 Md. 460; *Norris v. Waco*, 57 Tex. 635; *Chandler v. Boston*, 112 Mass. 200; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Morford v. Unger*, 8 Iowa, 82; *Hewitt's Appeal*, 88 Pa. St. 55; *Chicago, etc. Ry. Co. v. Langlade*, 56 Wis. 614; *People v. Riverside*, 70 Cal. 461; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278. A judicial district may be abolished by transferring all the counties comprising it to another district. *Aikman v. Edwards*, 55 Kan. 751, 30 L. R. A. 149.

⁸⁴ *Dillon, Mun. Corp.*, § 185.

⁸⁵ *Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751; *Chicago, etc. Ry. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

⁸⁶ *Smith v. Sherry*, 50 Wis. 200; *Princess Co. Com. v. Bladensburg*, 51 Md. 468.

⁸⁷ *Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751.

⁸⁸ *State v. Forest*, 74 Wis. 610; *Kelly v. Meeks*, 87 Mo. 396; *Strosser v. Ft. Wayne*, 100 Ind. 443; *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558. In *State v. Warner*, 4 Wash. 773, 17 L. R. A. 263, it was held that the annexation of territory to a city is not an amendment of its charter within the meaning of the provision of the constitution which requires amend-

and it is then for the court to determine whether the power has been properly exercised.⁸⁹

§ 280. What territory may be annexed.—The authority delegated is generally to annex adjacent or contiguous territory. Adjacent lands means those lands lying so near and in such close proximity to the territory of a municipality as to be suburban in their character and to have some unity of interest with the city.⁹⁰ Contiguous lands are such as are not separated from the corporation by outside lands.⁹¹ Corporate limits may reasonably and properly be extended so as to take in contiguous lands—

1. When they are platted and held for sale or use as town lots.

2. Whether platted or not, if they are held to be bought on the market, and sold as town property when they reach a value corresponding with the views of the owner.

3. When they furnish the abode for a densely-settled community or represent the actual growth of a town beyond its legal limits.

4. When they are needed for any proper town purpose, as for the extension of the streets or sewer, gas or water system, or to supply places for the abode or business of its citizens, or for the extension of needed police regulations.

5. When they are valuable by reason of their adaptability for prospective town uses. But the mere fact that their value is enhanced by reason of their nearness to the corporation is no ground for their annexation, unless it appears that the enhanced value is due to adaptability to town uses.

But city limits should not be extended so as to take in contiguous lands—

1. When they are used only for agriculture or horticulture, and are valuable on account of such use.

ments to be submitted to the vote of the people. To the contrary see *Westport v. Kansas City*, 103 Mo. 141.

⁸⁹ *Ewing v. State*, 81 Tex. 177; *State v. Eldson*, 76 Tex. 302, 7 L. R. A. 733; *State v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Vestal v. Little Rock*, 54 Ark. 321, 11 L. R. A. 778.

⁹⁰ *State, Childs v. Village of Minnetonka*, 57 Minn. 526, 25 L. R. A. 755. The cases are digested in a note to this case.

⁹¹ *Vestal v. City of Little Rock*, 54 Ark. 321, 11 L. R. A. 778. Lands on the opposite side of a river from a city may be contiguous to the city. *Ibid.*; *Denver v. Coulehan*, 20 Colo. 471.

2. When they are vacant and do not derive special value from their adaptability for city uses.⁹²

§ 281. Illustrations.—There are many cases illustrating the principle stated in the preceding section. Thus, a city comprising two miles of territory cannot incorporate an area of ten square miles, including farms and unoccupied country.⁹³ Three square miles of territory containing two settlements separated by unoccupied farm lands, unconnected by lines of buildings or improvements, cannot be incorporated.⁹⁴ A ravine dividing two areas of population is not such a natural barrier as will prevent the including of both in one village.⁹⁵ Lands occupied by the owner exclusively as a florist and farmer, to which no streets or town improvements extend, and which the line of settlement has not reached, cannot be annexed and subjected to municipal taxation.⁹⁶ A boundary cannot be extended so as to include territory already included in another city without direct legislative authority, which must authorize the restriction of the territory of the other corporation.⁹⁷

§ 282. Property and debts upon division of territory.—The right of the legislature to alter, divide or abolish public corporations, and to make such a division of property and apportionment of debts as is deemed equitable, is well settled.⁹⁸ The power is strictly legislative,⁹⁹ and not subject to the control of the courts. The apportionment may be made at the time of the division of the territory or at a subsequent time. Where the original act does not make a disposition of the common property and

⁹² *Vestal v. City of Little Rock*, *supra*, and cases cited in annotation, 11 L. R. A. 778.

⁹³ *State v. Eldson*, 76 Tex. 302, 7 L. R. A. 733.

⁹⁴ *In re Lakeville*, 7 Kulp. 84.

⁹⁵ *In re Edgewood*, 130 Pa. St. 348.

⁹⁶ *Vestal v. City of Little Rock*, *supra*.

⁹⁷ *Darby v. Sharon Hill*, 112 Pa. St. 66. As to severance of territory in which rival villages have grown up, see *Ashley v. Calllope*, 71 Iowa, 466.

⁹⁸ *Winona v. School District*, 40 Minn. 13, 3 L. R. A. 45; *Johnson v. San Diego*, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; *State v. Harshaw*, 73 Wis. 211; *Granby v. Thurston*, 23 Conn. 416; *Olney v. Harvey*, 50 Ill. 453; *Larimie Co. v. Albany Co.*, 92 U. S. 307; *Darby v. Sharon Hill*, 140 Pa. St. 250.

⁹⁹ *Bristol v. New Chester*, 3 N. H. 524; *Land Co. v. Oneida*, 83 Wis. 649.

debts, "the legislature may at any subsequent time, by a later act, apportion them in such manner as seems to be just and equitable."¹

When a portion of the territory of a public corporation is detached and created into a new corporation, or attached to another existing corporation, and the legislature makes no apportionment of property or debts, the old corporation retains all the public property, including what falls within the limits of the new corporation, and is responsible for all the debts contracted by it before the separation, without claim to contribution.² Thus, where the limits of a school district were so changed as to leave the school-house within the territory of another district, the original district was held to retain its ownership of the building.³ But, when the old corporation is abolished and new ones created out of its territory, the new corporations are treated as successors of the old, and as such liable for its debts and entitled to its property. Each of the corporations will then take the public property which falls within its limits.⁴

¹ *Montgomery Co. v. Menfee*, 93 Ky. 33; *Sedgwick v. Bunker*, 16 Kan. 498.

² *Johnson v. San Diego*, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178, and cases cited; *Perry Co. v. Conway Co.* 52 Ark. 430, 6 L. R. A. 665. *Contra*, *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197; *Hampshire Co. v. Franklin Co.*, 16 Mass. 75. It has been said that when territory is detached from a public corporation, the old corporation has no claim upon the corporate property which falls without its new boundaries. Language to this effect was used in *Larimie Co. v. Albany Co.*, 92 U. S. 307, and in *Mt. Pleasant v. Beckwith*, 100 U. S. 514. But as said by Mr. Justice

Mitchell in Winona v. School Dist. Sup't: "It is a remarkable fact that these suggestions of a limitation or qualification of the rule are not only purely *obiter*, but the question is not discussed; no reason is assigned and no authority cited in its support, unless it be the old case of *North Hempstead v. Hempstead*, 2 Wend. 110."

³ *Winona v. School District*, 40 Minn. 13, 3 L. R. A. 45, 12 Am. St. 687.

⁴ *Shapleigh v. San Angelo*, 167 U. S. 646; *Mobile v. Watson*, 116 U. S. 289; *Winona v. School District*, *supra*; *Demattos v. New Whatcom*, 4 Wash. 127, 29 Pac. 933; *Stone v. Charlestown*, 114 Mass. 214.

CHAPTER XX.

CONSTITUTION LIMITATIONS UPON LEGISLATIVE POWER OVER PUBLIC CORPORATIONS.

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| <p>§ 283. In general.</p> <p>284. General laws.</p> <p>285. The requirement of a "uniform system of government."</p> <p>286. Illustrations.</p> <p>287. The requirement that "laws of a general nature shall have uniform operation throughout the state."</p> <p>288. Illustrations.</p> <p>289. Local-option laws.</p> <p>290. Classification.</p> <p>291. Class containing but one member.</p> | <p>§ 292. Geographical conditions.</p> <p>293. Population.</p> <p>294. Illustrations.</p> <p>295. Possible accession to a class.</p> <p>296. Legislation regulating the "business," "affairs" and "internal affairs" of corporations.</p> <p>297. The prohibition of special legislation "where a general law can be made applicable."</p> <p>298. Amendment or repeal of existing special charters.</p> |
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§ 283. In general.—The evils incidental to special legislation and the consequent lack of uniformity have led to the general adoption of constitutional provisions prescribing the manner in which the legislature shall exercise power over public corporations. Such provisions, in so far as they affect the manner of creating, have been referred to in a former chapter.¹ Where no such limitations are found, the legislature may exercise its powers by either special or general laws. These constitutional provisions vary in form and language. In some states they refer only to private corporations, while in others they refer to all corporations except those created for municipal purposes. This phrase has no definite technical import. It has been construed as applying to a corporation established for the purpose of raising funds and conducting a public school.² It does not include a county³ nor

¹ For a detailed examination of the law of the subject considered in this chapter, see Binney's Restrictions upon Local and Special Legislation in the United States.

² Horton v. Mobile School Com-

missioners, 43 Ala. 598. See St. Louis v. Shields, 62 Mo. 247, at 251.

³ People v. McFadden, 81 Cal. 489, 22 Pac. 851.

a town.⁴ Neither a drainage district⁵ nor a sanitary district⁶ are included in the provision prohibiting the formation of "cities, towns and villages" by special legislation. So, poor districts are not included within a provision prohibiting special legislation "regulating the affairs of counties, townships, wards, boroughs and school districts."⁷

§ 284. General laws.—A general law is one which operates equally and uniformly upon all persons, places and things brought within the relations and circumstances for which it provides;⁸ or, in the words of a leading Pennsylvania case,⁹ "a statute which relates to persons or things as a class is a general law; while a statute which relates to particular persons or things of a class is special." The mere grouping together in a single act of a number of special or local laws does not make a general

⁴ *Eaton v. Manitowoc Co.*, 44 Wis. 489.

⁵ *Owners of Lands v. People*, 113 Ill. 296, at 315.

⁶ *Wilson v. Board*, 133 Ill. 443, 27 N. E. 203.

⁷ *Jenks Township v. Sheffield Township*, 135 Pa. St. 400, 19 Atl. 1004. See (Board of Police Commissioners) *State v. Covington*, 29 Ohio St. 102. A provision that "no corporation shall be created or its powers increased or diminished by special law" applies to private corporations only. *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364; *State v. Wilson*, 12 Lea (Tenn.), 246. But see *Corporate Powers of Council Grove*, 20 Kan. 619.

⁸ *State v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218; *People v. Wright*, 70 Ill. 388; *State v. Cooley*, 56 Minn. 540. In *People v. Cooper*, 83 Ill. 585, the court said: "The number of persons upon whom the law shall have any direct effect, may be very few, by reason of the subject to which it relates, but it must operate equal-

ly and uniformly upon all brought within the relations and circumstances for which it provides." In *McAunich v. M., etc. R. Co.*, 20 Iowa, 388, the court said: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for, is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation." See, also, *Welker v. Potter*, 18 Ohio St. 85; *Kingsbury v. Sperry*, 119 Ill. 279; *State v. Parsons*, 40 N. J. L. 1; *Eckerson v. Des Moines*, 137 Ia. 452, 115 N. W. 177.

⁹ *Wheeler v. Philadelphia*, 77 Pa. St. 338; *State v. Spande*, 37 Minn. 322. See *Earle v. Bd. of Education*, 55 Cal. 489; *Harwood v. Wentworth*, 162 U. S. 547.

law. Thus, an act providing that in eight designated counties of the state a certain official should receive a fixed annual salary named therein is a special law.¹⁰ The words "laws of a general nature" have practically the same meaning. A law is of a general nature if it affects the whole of a class of persons or things.¹¹

§ 285.—The requirement of a "uniform system of government."—A constitutional provision to the effect that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable," is mandatory.¹² Its purpose is to prevent the legislature from establishing different systems of town and county government as well as to prevent special legislation. But "where the legislature has established a system of town and county government substantially uniform throughout the state, it may be conceded that its action is final upon the matter. The courts in such a case would not attempt to review the action of the legislative body, and decide whether it might not have perfected a system more nearly uniform. But, when a law like the one before us breaks the uniformity of a system already in operation, it seems to us that it is a proper exercise of judicial power to declare that the act is void, because it departs from the rule of uniformity which the constitution enjoins.¹³ The requirement of a uniform system of government does not prohibit the classification of public cor-

¹⁰ Board of Freeholders v. Stevenson, 46 N. J. L. 173.

¹¹ Brooks v. Hyde, 37 Cal. 366.

¹² State v. Dousman, 28 Wis. 541, per Lyon, J.; State v. Riordan, 24 Wis. 484; State v. Supervisors, 25 Wis. 339; Land, etc. Co. v. Brown, 73 Wis. 294, 3 L. R. A. 472. See, also, State v. Boyd, 19 Nev. 43. The provision in the constitution of Illinois that "the general assembly shall provide by a general law for a township organization," etc., has no reference to counties. Leach v. People, 122 Ill. 420. In New Jersey "town" includes cities. State v. Parsons, 40 N. J. L. 1. In People v. Lake County, 33 Cal. 487, a provision "That the legisla-

ture shall provide a system of county * * * government which shall be as nearly as practicable uniform throughout the state," was held to be directory only. Rhodes, J., said: "We have no hesitation in saying that policy forbids the attempt on the part of the judiciary, at this late day, to determine how far it is practicable to maintain uniformity in the system of county governments. They are now so diverse, in most respects, except the names of the bodies invested with governmental functions, that scarcely any two counties have governments similar in all particulars."

¹³ State v. Riordan, 24 Wis. 484.

porations for legislative purposes;¹⁴ but all in the same class must possess the same power and be subject to the same restrictions, as "a system of municipal government in which cities of the same class may have dissimilarity in character of organization as well as different powers is not a uniform system within the meaning of the constitution."¹⁵ The mere fact that diverse results may flow from the execution of granted powers of local government does not render the enabling statute special or local.¹⁶ If the same powers are possessed by all municipalities of the same

¹⁴ *Lake v. Palmer*, 18 Fla. 501.

¹⁵ *McConihe v. McMurray*, 17 Fla. 238; *State v. Stark*, 18 Fla. 255.

¹⁶ *In re* Petition of Cleveland, 52 N. J. L. 188. Said Van Syckel, J.: "Uniformity in results cannot co-exist with the right of local self-government until all men shall be of one mind. No one will assert that an act is local or special which gives to all the cities of this state the right to establish, by ordinance, the mode in which their subordinate officers shall be elected. Under such a statute, one city might make the tenure of office a term of years, another during good behavior, and a third at the will of the common council. Such diverse results in the execution of the granted power, obviously, could not outlaw the act of the legislature. The authority granted to all is the same; the dissimilarity is in its use—a dissimilarity inherent in the idea of local government. The uniformity exacted by the constitutional mandate must be sought for, not in the results which flow from the free, unhampered exercise of the granted power of local government, but in the fact that every locality is afforded a like right to adopt and exercise, in its own way, the same powers which are bestowed upon every other like

political body. To the one no privilege must be offered for acceptance which is not extended to the other. The authority given must be the same; it may be executed in a different way, or in the same way, at the option of the recipient. That is the uniformity to which the judicial declarations in the adjudged cases in this state must be referred. One of the conspicuous evils at which this constitutional amendment was aimed, was, in my judgment, this: that prior to the amendment a few persons could go before the legislature and secure the passage of a special law to promote their own purposes, which might be obnoxious to the body of citizens. In such event, the only remedy was by an appeal to a subsequent legislature, and that might be too late to wholly repair the mischief. Such enactments are now forestalled by the fact that they cannot be made applicable without being submitted to the approval of the entire body of voters. In this way the people of every city are left free to select the mode in which they will regulate and conduct their local affairs, and it is this which impresses such legislation with the character of general, and not special, legislation. Gauged by this standard, there is no infirmity in the legis-

class, the law is general. It has been held that such a provision is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county an authority of local government not granted to another of the same class.¹⁷ As a matter of course, the legislature cannot do indirectly what it cannot do directly. Hence, it cannot enact a special law to legalize a defective incorporation under the general law, without violating the provision that the legislature shall establish a uniform system of county, town and municipal government.¹⁸

§ 286. Illustrations.—Under the provision requiring uniformity.—An act which provides for a county board of supervisors of eight members in a certain county, while under the general law in force in all parts of the state such boards have three members, violates the provision requiring uniformity.¹⁹ Where by an existing general law the power was conferred upon all county boards “to build and keep in repair county buildings,” it was held that an act appointing three commissioners “to superintend the erection of a court-house in the county of M.” was invalid.²⁰ So, an act restricting the “power of the supervisors of

lation which is the subject of this controversy. It applies to the entire class; there is no exception. It is held out to the free acceptance of all, and is capable of being accepted or rejected by every city in the state. In determining whether an act is general or special, we must regard the time of its enactment. If it applies to all cities then in existence, it seems to be a contradiction, in terms, to say that it is special. To be special, it must exclude some; if it excludes none, and expressly embraces all, it must be general.” See, also, *Albright v. Sussex Co.*, etc., Com’rs, 68 N. J. L. 523, 53 Atl. 612.

¹⁷ *Paul v. Gloucester*, 50 N. J. L. 585.

¹⁸ *Enterprise v. State*, 29 Fla. 128, 10 So. 740.

¹⁹ *State v. Riordan*, 24 Wis. 484.

²⁰ Said Paine, J.: “It takes an important general power of the county board in that county (Milwaukee), and confers it upon special commissioners designated by the legislature. That it is not a uniform system to provide that in one county the power to build the county buildings shall be vested in special commissioners selected by the legislature, while in other counties the same power is vested in the boards of supervisors elected by the people, is obvious. It is equally obvious that it is not as uniform as practicable, because it is self-evident that this power might be vested in the county boards in all the counties. Independent of this act, it was so vested in fact. There was, under the existing law, complete uniformity.” *State v. Supervisors*, 25 Wis. 339.

Milwaukee county to act upon claims against the county and enter into contracts in its behalf without previous action thereon by the county auditor," was held void as an attempt to take from that board important powers, which it possessed under the general statute of the state.²¹ An act relating to county aid in the construction of bridges, which provided that "this act shall not apply to the county of Grant," violates the requirement of uniformity.²² But "the power to construct drains is in no proper sense a part of the usual powers belonging to town and county government, but is a special authority given for a particular purpose, which may be conferred upon any persons or body upon which the legislature may see fit to confer it." Hence, an act providing for lowering the ordinary level of water in certain lakes in a designated county and for the drainage of wet and overflowed lands in any part of said county, different from the system of drainage in the remainder of the state, is valid.²³

Under the provisions requiring uniformity in legislation affecting public corporations, an act which tends to remove existing diversity is valid. Thus, where the peculiarities which the act sought to abolish existed in but one county, it was said that "whenever an act of the legislature is general in its terms, and the only effect is to remove in some degree the differences in the various regulations of the internal affairs of towns or counties, and to subject those internal affairs to the operation of a general law, the act is not prohibited by the constitution, but is in strict accordance with the command of that instrument, which expressly enjoins upon the legislature the passage of laws for such cases."²⁴

§ 287. The requirement that "laws of a general nature shall have uniform operation throughout the state."—This provision is found in the constitutions of many of the states.²⁵ Its effect is to prevent the legislature from restricting the operation

²¹ *State v. Dousman*, 28 Wis. 541. In *McRae v. Hogan*, 39 Wis. 529, an act which attempted to "take from the possession and control of the town officers in Chippewa County a portion of the moneys raised in their towns for highway purposes, and intrust its expenditure to the county board, contrary

to the general law," was held void.

²² *La Valle v. Supervisors*, 62 Wis. 376.

²³ *Bryant v. Robbins*, 7 Iowa, 258.

²⁴ *Freeholders v. Stevenson*, 46 N. J. L. 173.

²⁵ For its history see *McGill v. State*, 34 Ohio St. 228.

of laws of a general nature to any part of the state less than the whole.²⁶ As it applies to general laws only, it does not prohibit proper local legislation.²⁷ It is construed as meaning "not that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but that they shall operate uniformly or in the same manner upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law in respect to the privileges and immunities conferred by it, or the acts which it prohibits."²⁸ It does not prevent a proper classification of persons and subjects for purposes of legislation, as laws which operate uniformly upon members of a class have uniform operation. Of course, a law which is in full force in every part of the state has a uniform operation throughout the state.²⁹

The taking of a class out of the general terms of a statute by an exception is as obnoxious to the restraint imposed by this provision as the passage of a special act affecting and relating to the excluded corporation only. Thus, a provision in an act relating to police, that it "shall not apply in and to cities commonly known as seaside and summer resorts," renders the act invalid.

§ 288. Illustrations.—Whether a statute is of a general nature depends not upon its form, but upon its application to the subject-matter.³⁰ A law may thus be special in form, and yet come within this provision. The courts will go behind the form of the enactment in order to determine its character. If it could be assumed merely from the fact of the enactment of a statute that the legislature had information showing that there was a necessity for such legislation in respect to the particular locality, all such legislation would have to be upheld regardless of the subject-matter.³¹ On the other hand, a law may relate to a subject-matter which is general, and still not be of a general nature. The subject may be general, while the purpose of the act may be spe-

²⁶ *Costello v. Wyoming*, 49 Ohio St. 202, 30 N. E. 613.

²⁷ *State v. Judges*, 21 Ohio St. 1; *State v. Covington*, 29 Ohio St. 102; *Ruffner v. Commissioners*, 1 Disn. (Ohio), 196; *Cricket v. State*, 18 Ohio St. 9; *People v. C. P. R. Co.*, 43 Cal. 398, at 432.

²⁸ *Ex parte Smith*, 38 Cal. 702; *Leep v. St. Louis, Iron Mt. Ry. Co.*,

58 Ark. 407, 23 L. R. A. 264; *In re Oberg*, 21 Oreg. 406, 14 L. R. A. 577.

²⁹ *State v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218.

³⁰ *State v. Ellet*, 47 Ohio St. 90, 23 N. E. 931.

³¹ *State v. Ellet*, 47 Ohio St. 90, 23 N. E. 931.

cial and local.³² Thus, the subject of common schools is of a general nature, but it is held in Ohio that a special school district may be formed from territory within the limits of the township, without conflicting with a constitutional provision.³³ The following acts have been held invalid because contravening the constitutional requirement that all laws of a general nature must have uniform operation throughout the state: An act relating to salaries of county officers in counties of certain classes, as it prevented the county government act, which was essentially a law of a general nature, from having uniform operation.³⁴ An act providing that the salaries fixed by the act should take effect at different times in different counties.³⁵ An act providing for the construction, improvement and repair of sidewalks in or leading out of villages, because the subject-matter was of a character that concerned the inhabitants of every village in the state. But acts designed to regulate the amount of compensation of local officers,³⁶ regulating the police force in the city of Cincinnati through a board of commissioners to be appointed by the governor; ³⁷ conferring power upon county commissioners to erect pub-

³² *State v. Shearer*, 46 Ohio St. 275, 20 N. E. 335.

³³ *State v. Shearer*, 46 Ohio St. 275, 20 N. E. 335, overruling *State v. Powers*, 38 Ohio St. 54. Such laws, although dealing with a general subject-matter, are intended to meet purely local conditions and requirements. In *McGill v. State*, 34 Ohio St. 228, the court said: "It is easy to comprehend that a law defining burglary or bigamy and its penalty, or regulating descent and distribution, or prescribing the capacity requisite for the testamentary disposition of property, regulating conveyances, or prescribing a rate of interest for the use of money, and others of similar effect and operation, are laws of a general nature, requiring a uniform operation throughout the state. To discriminate between localities or citizens in the enactment of laws of such a na-

ture would be to grant privileges or impose burdens of a character which it was the clear purpose of the constitution to provide against. But that a law may be general and concern matters purely local or special in their nature, or may be local or special and relate to a matter that may be made the subject of a general law, not only rests upon sound reason, but is well supported by authority." But in *State v. Ellet*, 47 Ohio St. 90, 23 N. E. 931, the court said: "The local statute must be upon a subject in its nature local as well as local in its operation."

³⁴ *Dougherty v. Austin*, 94 Cal. 601.

³⁵ *Miller v. Kister*, 68 Cal. 142.

³⁶ *Crickett v. State*, 18 Ohio St. 9; *Hart v. Murray*, 48 Ohio St. 605.

³⁷ *State v. Covington*, 29 Ohio St. 102.

lic buildings; ³⁸ authorizing county commissioners to subscribe on behalf of the county to the stock of a railroad company; ³⁹ providing a special mode of selecting jurors in a designated county, ⁴⁰ have been held to be of a local nature and not affected by this provision.

§ 289. **Local-option laws.**—Statutes allowing the people of a particular locality to elect between different systems of police regulation or local government necessarily tend to prevent general laws from having a uniform operation throughout the state. In some states it is held that the restrictions upon local and special laws have no effect upon these subjects; at least so long as the communities of the same class have the same option.⁴¹ In Florida it was held that an option, although granted to every member of a class, violated the constitutional provision. The court said: ⁴² “The government of each class must be the same, and such must be the result of the action of the legislature, independent of the contingency of local discretion or option in the premises.” In Pennsylvania it is held that changes in the general municipal corporation law cannot be limited to such cities as adopt the new law.⁴³ So, a law repealing a general fence law, but to take effect only in such counties as should vote for the repeal of the general law, is invalid.⁴⁴ The great weight of authority supports the principle that the legislature may permit a locality to determine whether intoxicating liquors shall be sold

³⁸ *Ruffner v. Com., Dism.* (Ohio), 196.

³⁹ *Cass v. Dillon*, 2 Ohio St. 607.

⁴⁰ *McGill v. State*, 34 Ohio St. 228. In this case it was not doubted that the matter of selecting jurors was a general subject in which the people of the state at large was interested, and that since the organization of the state it had been provided for by the general law, so that the law providing a special mode of selecting jurors in that county was one treating of a general subject already embraced in general laws, making provisions applicable to all counties in the state; but the court held that this act was not a law

of a general nature requiring uniformity of operation throughout the state, but was designed to meet a special want in a particular county and was not in conflict with the constitution.

⁴¹ *Paul v. Gloucester County*, 30 N. J. L. 585; *In re Cleveland*, 52 N. J. L. 188; *State v. Pond*, 93 Mo. 606; *People v. Hoffman*, 116 Ill. 587. *Contra*, *People v. Cooper*, 83 Ill. 585.

⁴² *McConihe v. State*, 17 Fla. 238.

⁴³ *Commonwealth v. Denworth*, 145 Pa. St. 172; *People v. Cooper*, 83 Ill. 585.

⁴⁴ *Frost v. Cherry*, 122 Pa. St. 417.

within its limits. If the law is complete when it comes from the hands of the legislature, it is a general law operative throughout the state; thus, a statute permitting a certain penalty in a prohibitory liquor law to be suspended in any city upon the filing of the written consent of a certain proportion of the voters is not local or special; and it does not tend to produce diversity of laws in the different parts of the state. The court said: "The act is complete in itself, requires nothing further to give it validity, and does not depend upon the popular vote of the people."⁴⁵ An act which tends to diminish diversity and establish greater uniformity in the system is not invalidated by a provision that it shall be operative only on such members of the class to which it relates as shall accept its provisions.⁴⁶ But where the exercise of this discretionary power would tend toward diversity instead of uniformity, as where corporations existing under the control of the general law would, by accepting the act, become members of a class by themselves, the act is invalid.⁴⁷

§ 290. Classification.—The legislature may, for purposes of legislation, divide the subject-matter of legislation into classes

⁴⁵ *State v. Forkner*, 94 Iowa, 733, 28 L. R. A. 206, reviewing many authorities. *Contra*, *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115. For a discussion of the submission of state and local laws to the vote of the people, see Oberholtzer, *The Referendum in America*, Phila., 1893.

⁴⁶ *Reading v. Savage*, 124 Pa. St. 328. *In re Cleveland*, 52 N. J. L. 188, a law authorizing the mayors of all cities of the state to appoint the principal municipal officers, to become operative in such cities as elect to accept it, was held general. In *Stanfield v. State*, 83 Tex. 317, 18 S. W. 577, an act authorizing the commissioners' court to abolish the office of county superintendent "when, in their judgment, such court may deem it advisable," was held general, as it related to the entire state. In

State v. Hunter, 38 Kan. 578, 17 Pac. Rep. 177, an act providing for the appointment of a board of police commissioners by the executive council, upon the petition of two hundred *bona fide* householders, or when the council shall deem it advisable for the better government of such cities, was held to be a general law. In *State v. Pond*, 93 Mo. 606, 6 S. W. 469, Norton, J., said: "The fact that one or more counties, or one or more cities or towns, may by a majority vote put the law in operation in said county or counties, cities and towns, and other counties, cities and towns, may not do so, does not affect the rule, nor furnish a test by which to decide whether the law is local or general."

⁴⁷ *Scranton's Appeal*, 113 Pa. St. 176, 6 Atl. 158. Affirmed in *Com. v. Halstead* (Pa.), 7 Atl. 221.

and then legislate for each class as a whole.⁴⁸ But a valid classification must have a basis in reason, and not be adopted arbitrarily as a mere cover for special legislation under the form of general legislation.⁴⁹ "The underlying principle of all cases," says Mr. Justice Sterrett,⁵⁰ "is that all classification with a view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others. Laws enacted in pursuance of such classification and for such purposes are, properly speaking, neither local nor special." There must be something more than a mere designation of the subjects of a class. "The characteristics which serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded."⁵¹ The following are illustrations of cases in which the basis of classification was improper: Counties

⁴⁸ *State v. Cooley*, 56 Minn. 540; *In re Ruan*, 132 Pa. St. 257, 7 L. R. A. 193; *Van Riper v. Parsons*, 40 N. J. L. 123; *Rutgers v. New Brunswick*, 42 N. J. L. 51; *State v. Trenton*, 42 N. J. L. 486; *State v. Board of Freeholders*, 52 N. J. L. 512, 19 Atl. 972; *Pritchett v. Stanislaus Co.*, 73 Cal. 310; *State v. Berka*, 20 Neb. 375, 30 N. W. 267; *State v. Spaude*, 37 Minn. 322, 34 N. W. 164; *Edmonds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 Pa. St. 401; *City of Scranton v. Whyte*, 148 Pa. St. 419, 23 Atl. 1043; *Commonwealth v. Macferon*, 152 Pa. St. 244, 25 Atl. 557; *Appeal of Ayars*, 122 Pa. St. 266. "Legislation which applies to all members of a class is not local or special, but general." *Reeves v.*

Phila. Traction Co., 152 Pa. St. 153, 25 Atl. 517; *Comm. v. Moir*, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. 801; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580.

⁴⁹ *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725; *State v. Cooley*, 56 Minn. 540.

⁵⁰ *Ayar's Appeal*, 122 Pa. St. 266, 2 L. R. A. 577. But this should not be accepted as meaning that the courts may judge whether there is any necessity or need of classification; it is sufficient if the basis of classification has relation to some legitimate purpose of legislation; and that is the only point for the judiciary to decide.

⁵¹ *State v. Hammer*, 42 N. J. L. 435; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Ayar's Appeal*, 122 Pa. St. 266; *Long Branch v. Sloane*, 49 N. J. L. 356.

having a population of sixty thousand in which the fees allowed county clerks are turned over to the county should have an assistant clerk paid by the county.⁵² Seaside resorts where there is taxable property to the amount of \$100,000 embraced within an area not exceeding two square miles might have borough governments.⁵³ Seaside resorts governed by boards of commissioners, the purpose being to take from a township committee, and to confer upon the commissioners, the right of expending the road taxes.⁵⁴ Cities and towns then having race courses for the purpose of authorizing the granting of licenses for maintaining race courses.⁵⁵ Cities and towns in which the streets have been lighted by legislative authority.⁵⁶ Counties having public road boards.⁵⁷ Townships not containing an incorporated city or borough.⁵⁸ Cities of not less than ten thousand inhabitants divided into not less than two nor more than three wards.⁵⁹ Counties where the clerks are at the time of the passage of the law paid an annual salary.⁶⁰ Cities of more than fifteen thousand inhabitants where licenses are not granted by a board of excise, nor by a court of common pleas.⁶¹ Cities where a board of assessment and revision

⁵² *Ernst v. Morgan*, 39 N. J. Eq. 891.

⁵³ *State v. Somers' Point*, 52 N. J. L. 32, 18 Atl. 694, 6 L. R. A. 57. Said Depue, J.: "Municipal powers and franchises, such as this act confers, are as appropriate to places in an inland situation as to those located on the seashore, and are as suitable to localities inhabited or frequented by other individuals as to resorts for summer visitors. * * * If taxable property irrespective of population be a proper classification on which to base a grant of municipal powers of the scope of those granted by this act, such property presents the same characteristics wherever situated." *Alsbath v. Philbrick*, 50 N. J. L. 581, 15 Atl. Rep. 579.

⁵⁴ *Ross v. Winsor*, 48 N. J. L. 95.

⁵⁵ *State v. Elizabeth*, 56 N. J. L. 71, 23 L. R. A. 525.

⁵⁶ *Van Giesen v. Bloomfield*, 47 N. J. L. 442, 2 Atl. 249.

⁵⁷ *Lodi Township v. State*, 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56.

⁵⁸ *Dobbins v. Northampton*, 50 N. J. L. 496, 14 Atl. 587. The court said: "The classification on which this act rests is a classification setting apart townships not having an incorporated city or borough within the township bounds from the other townships in this State. The subject of the legislation—grading, making and working roads—is one that is common to all townships of this state as well as to the townships set apart for this scheme of legislation."

⁵⁹ *Randolph v. Wood*, 49 N. J. L. 85.

⁶⁰ *Gibbs v. Morgan*, 39 N. J. Eq. 126.

⁶¹ *Closson v. Trenton*, 48 N. J. L. 438.

of taxes is in existence.⁶² Counties of more than sixty thousand inhabitants in which there shall be any city of more than eight thousand inhabitants situated twenty-seven miles from the county seat.⁶³

§ 291. **Class containing but one member.**—The basis of classification must be characteristics and not numbers. There may be a public corporation in the state with such characteristics as to effectually distinguish it from all others. The fact that an act at the time of its passage affects but one corporation does not make it a special law, if there is nothing to prevent other corporations from becoming members of the class when they acquire the necessary population or comply with the other conditions.⁶⁴

⁶² *Hammer v. State*, 44 N. J. L. 667.

⁶³ *Van Giesen v. Bloomfield*, 47 N. J. L. 442; *Freeholders of Hudson v. Buck*, 51 N. J. L. 155; *State v. Wood*, 49 N. J. L. 85, 7 Atl. 286; *City of New Brunswick v. Fitzgerald*, 48 N. J. L. 457, 8 Atl. 729; *State v. Simon*, 53 N. J. L. 550, 22 Atl. 120; *Turner v. Fish*, 19 Nev. 295; *County of San Luis Obispo v. Graves*, 84 Cal. 71; *Pratt v. Browne*, 135 Cal. 649, 67 Pac. 1082.

⁶⁴ *State v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729; *Govern v. State*, 47 N. J. L. 368, 48 N. J. L. 612, 9 Atl. 577; *Ex parte Wells*, 21 Fla. 280; *State v. Donovan*, 20 Nev. 75, 15 Pac. 783; *State v. Woodbury*, 17 Nev. 337; *State v. Graham*, 16 Neb. 74; *Marmet v. State*, 45 Ohio St. 63; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Commonwealth v. Patton*, 88 Pa. St. 258; *Kilgore v. Magee*, 85 Pa. St. 401; *State v. Tolle*, 71 Mo. 645; *Ewing v. Hoblitzelle*, 85 Mo. 64; *Rutherford v. Heddens*, 82 Mo. 388; *Darrow v. People*, 8 Colo. 417, 8 Pac. 611; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516. In *Van Riper v. Parsons*, 40 N. J. L. 123, 29 Am. R. 210, the court said: "The

law in all its provisions is general, broad enough to reach every portion of the state, abating legislative commissions for the regulation of municipal affairs wherever they existed. Such commissions are distinguished from other sorts of municipal governments by characteristics sufficiently marked and important, to make them clearly a class by themselves, and, upon the whole of this class, this law operates equally by force of terms which are restricted to no locality. A law so framed is not a special or local law, but a general law, without regard to the consideration that, within the state, there happens to be but one individual of the class or one place where it produces effect." In *West Chicago Park Commissioners v. McMullen*, 134 Ill. 171, 25 N. E. 676, the court said: "If it is true, as suggested, that the act is applicable to conditions existing in a single city in the State, that fact does not necessarily render it local or special legislation. It is general in its terms and applies to all cities of the state which, at the time of its passage, had parks under the control of park commissioners, or that

§ 292. Geographical conditions.—Whether geographical conditions are a proper basis for classification depends upon the nature of the legislation. Such distinctions necessarily exclude the possibility of accession to the class. A classification of counties with reference to the number and geographical location of the cities they contain cannot usually be sustained.⁶⁵ But for the purpose of legislation authorizing the construction of drives upon the beach, a classification based upon location upon the seashore would be proper.⁶⁶

§ 293. Population.—For the purpose of appropriate legislation, population furnishes such a distinguishing characteristic as to render it a proper basis for classification. The needs of a great city are different from those of a small city or village. The organization of local government and the management of municipal affairs are unlike. Mere size, as measured by the number of inhabitants, necessarily creates conditions which call for different kinds of legislation. Hence, population has been universally recognized as a proper basis for the classification of public corporations. The cases supporting this are very numerous.⁶⁷

§ 294. Illustrations.—The following acts have been held constitutional: An act providing that in cities having a population of less than twelve thousand the term of office of councilman should be for as many years as there are councilmen in each

might, at any time thereafter, so have parks." The decision in *Dervine v. Cook County*, 84 Ill. 590, was controlled not by the fact that it could apply to but one city in the state, but that it was so limited in duration as to convince the court that it was physically impossible for any other city to come within the class during the existence of the law." But see *State v. Jones*, 66 Ohio St. 453, 64 N. E. 424; *State v. Beacom*, 66 Ohio St. 491, 64 N. E. 427.

⁶⁵ *Scowden's Appeal*, 96 Pa. St. 422.

⁶⁶ *State v. Wright*, 54 N. J. L. 130, 23 Atl. 117; *Anderson v. Trenton*, 42 N. J. L. 486. In *State v.*

Hammer, 42 N. J. L. 440, it was said, by way of illustration, that "a sample of the other or legitimate kind would be signified in a law that should give to all cities in the state situated on tide-water the privileges of using such water in connection with their sewers." Contrast *Ross v. Winsor*, 48 N. J. L. 95.

⁶⁷ *In re Passaic*, 54 N. J. L. 156, 23 Atl. 517; *Welker v. Potter*, 18 Ohio St. 85. See *Weinman v. Pass. R. Co.*, 118 Pa. St. 192. The court will take judicial notice of what the population of a county was according to the last census. *Worcester National Bank v. Cheney*, 94 Ill. 430.

ward.⁶⁸ An act providing for a police court in all cities of the second class that contain a population of not less than fifty thousand or more than one hundred thousand.⁶⁹ An act fixing fees and salaries of county officers in counties having a designated population.⁷⁰ An act regulating the construction of water-works and streets in cities having a certain designated population.⁷¹ An act prescribing a sewerage system in cities containing over thirty thousand and under fifty thousand inhabitants.⁷² An act prescribing the number of school directors "in all cities of this state now having or hereafter attaining a population of over three hundred thousand inhabitants."⁷³ An act requiring the judges of the circuit court to let contracts for publishing judicial notices in cities having over one hundred thousand inhabitants.⁷⁴ But population is not a proper basis of classification for legislation authorizing the issue of bonds to pay a floating debt, as the object of the law has no natural relation to the basis of classification adopted.⁷⁵

§ 295. Possible accession to a class.—Where the classification is based upon such conditions and facts that other corporations of like nature are excluded from ever coming within the class, it is necessarily arbitrary, and legislation based upon it is not general.⁷⁶ Thus, an act applying only to counties where there

⁶⁸ *Randolph v. Wood*, 49 N. J. L. 85.

⁶⁹ A difference in population requires different police regulations. *Matheson v. Caminade*, 55 N. J. L. 4; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; (Probate Courts under special constitutional provision) *Knickerbocker v. People*, 102 Ill. 218; *Rutgers v. New Brunswick*, 42 N. J. L. 51.

⁷⁰ *Board v. Leahy*, 24 Kan. 54.

⁷¹ *Warner v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166. There is a real and essential difference between the methods required in the management of public works in large and small cities; and population, hence, becomes a proper basis for classification. As said by Chief Justice Beasley, *In re Haynes*, 54 N. J. L. 6, at 28: "In a small city

the supervision and control of the streets and of the water supply may well be, as it usually has been, left in the hands of those intrusted to administer generally its affairs; but all experience has shown that such matters in large cities can be properly managed only by independent boards, duly organized for the purpose."

⁷² *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249.

⁷³ *State v. Miller*, 100 Mo. 439, 13 S. W. 677; *State v. Macklin* (Mo.), 13 S. W. Rep. 680.

⁷⁴ *State v. Tolle*, 71 Mo. 645.

⁷⁵ *Anderson v. Trenton*, 42 N. J. L. 486.

⁷⁶ *Commonwealth v. Patton*, 88 Pa. St. 258; *Rutgers v. New Brunswick*, 42 N. J. L. 51; *Nichols v. Walter*, 37 Minn. 264; *State v.*

were cast more than one thousand one hundred and fifty votes and less than one thousand three hundred and fifty votes at a specified election is invalid.⁷⁷ So an act granting courts power to grant licenses to inns and taverns in cities having a designated population by the census of 1875.⁷⁸ So an act regulating the relocation of county seats in all counties wherein at the date of the act the court-house and jail was not worth a designated amount of money.⁷⁹ So an act applying to cities in which a German newspaper had been published for three years before its passage, but not applying to cities which should thereafter come within the qualification.⁸⁰ In each of these cases the classification was arbitrary, and it was impossible in the nature of things that there should be any accessions to the class. The same difficulty may arise when the life of a statute is made so short as to render it impossible for any other city to acquire the necessary population; and in such a case the court will take judicial notice of the fact that no city can possibly grow so rapidly.⁸¹

Mitchell, 31 Ohio St. 592; State v. Pugh, 43 Ohio St. 98; State v. Anderson, 44 Ohio St. 247; State v. Ellet, 47 Ohio St. 90, 23 N. E. 931; State v. Smith, 48 Ohio St. 211, 26 N. E. 1069; Woodard v. Brien, 14 Lea (Tenn.), 520; Weaver v. Davidson Co., 104 Tenn. 315, 59 S. W. 1105; Malone v. Williams, 118 Tenn. 390, 103 S. W. 798. See State v. Herrmann, 75 Mo. 340.

⁷⁷ State v. Boyd, 19 Nev. 43.

⁷⁸ Zeigler v. Gaddis, 44 N. J. L. 363.

⁷⁹ Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970; Adams v. Smith, 6 Dak. 94. The act under consideration in State v. Hammer, 42 N. J. L. 435, applied to any city "where a board of assessment and revision of taxes now exists," and the court said: "The result, therefore, is that the act was intended to apply to those two cities alone, and the legal effect of the law as now constituted is the same as though it had in express terms de-

clared that it was not to be operative through the state at large, but only in the cities of Elizabeth and Newark."

⁸⁰ State v. Trenton, 54 N. J. L. 444, 24 Atl. 478.

⁸¹ In Devine v. Cook Co., 84 Ill. 590, in construing an act which, by its terms, applied only to counties having a population of over one hundred thousand inhabitants, and which expired within six years from the date of its passage, the court said that it would take judicial notice of the fact that Cook County was the only county in the state containing over one hundred thousand inhabitants, and that it could not be expected, "by any ordinary influx of population, that any other county will have that population within the brief period fixed for the duration of this law, viz., within a period of six years from the time the act should take effect. * * * The court will take judicial notice, not

§ 296. Legislation regulating the "business," "affairs" and "internal affairs" of corporations.—In some states we find a provision that the legislature shall pass no local or special law regulating the business, affairs or internal affairs of public corporations.⁸² Various constructions have been given these terms. In Indiana an act which created a court for a particular county was held not to regulate county business.⁸³ In Pennsylvania an act which authorized the holding of special sessions of the courts in a certain county in a place other than the county seat was held invalid as an attempt to regulate county business.⁸⁴ And subsequently, after the word "affairs" had been substituted for the word "business" in the constitution, it was held that an act to ascertain and appoint the fees to be received by certain county officers regulated the affairs of such counties.⁸⁵ So an act for regulating and maintaining fences and providing for a county election to determine the adoption or rejection of a repealing act was held invalid for the same reason.⁸⁶

These provisions do not limit the power of the legislature to create a new corporation or to repeal the charter of an existing one, thus leaving no internal affairs to be regulated, but to be valid the act must be limited to the mere creation of a new divi-

only that no other county in the state except Cook County, had one hundred thousand inhabitants, but also that, without some supernatural interposition, no other county in the state can have one hundred thousand inhabitants until after July 1, 1879. But it seems to me it is going too far to hold that the *mere fact* that a statute is applicable only to counties having one hundred thousand inhabitants renders it a local law. In the course of time several counties may have that number. A law intended to be perpetual may not, in my judgment, be subject to objection, although thus limited." In *Topeka v. Gillett*, 32 Kan. 431, an act which excluded all cities from its operation which failed to take advantage of its provisions within

ten days after its taking effect, and there being but three cities which could possibly possess the necessary qualifications within the time, all others being forever excluded, was held special. But the mere fact that an act is limited in the time of its duration does not necessarily make it special. *People v. Wright*, 70 Ill. 388.

⁸² See *Pell v. Newark*, 40 N. J. L. 71; *Freeholders v. Buck*, 51 N. J. L. 155.

⁸³ *Eitel v. State*, 83 Ind. 201; *Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460.

⁸⁴ *Scowden's Appeal*, 96 Pa. St. 422.

⁸⁵ *Morrison v. Bachert*, 112 Pa. St. 322.

⁸⁶ *Frost v. Cherry*, 122 Pa. St. 417.

sion or the alteration of an existing one. If the act is single and a new body finds the rules for its internal government in some general law, it is unobjectionable; but if the act of creation or alteration includes provisions looking to the regulation or government of the newly-created or altered district, it is an attempt to regulate the internal affairs of such district, and is invalid unless general.⁸⁷ While a corporation may thus be extinguished by a special law, it cannot be taken apart piecemeal, as by the repeal of a section here and there at different times. Its affairs would be as effectually regulated by thus depriving it of certain functions as by conferring new powers and attributes upon it.⁸⁸ The wards of a city are not public corporations, but are simply divisions created for the purpose of better enabling the municipality to exercise the authority with which it is vested. Hence, a limitation of the boundaries of a ward is a regulation of the "internal affairs" of a public corporation.⁸⁹

An act prohibiting the removal of a soldier or sailor from a public office "under the government of any city or county of this state" is a regulation of the internal affairs of counties.⁹⁰ So an act designating the newspapers which shall be selected as the official papers of cities regulates their internal affairs.⁹¹ An act prescribing the manner in which the indebtedness of a county shall be conducted is a law "regulating county business."⁹² An act regulating the assessment and revision of taxes in cities regulates their internal affairs.⁹³ The same is true of an act taking from the township committee and conferring upon the borough commissioners the right to expend the road tax appraised in the township.⁹⁴ But a law providing that no married woman holding any indebtedness of the state or the city may sell and transfer the same as though unmarried does not violate a constitutional provision forbidding legislation regulating the affairs of municipal corporations, as it "is simply the regulation of the mode and

⁸⁷ *Long Branch v. Sloane*, 49 N. J. L. 356.

⁸⁸ *Tiger v. Morris*, 42 N. J. L. 631.

⁸⁹ *State v. Mayor of Newark*, 53 N. J. L. 4, 20 Atl. 86.

⁹⁰ *State v. O'Connor*, 54 N. J. L. 36, 22 Atl. 1091.

⁹¹ *State v. Trenton*, 54 N. J. L. 444, 24 Atl. 478.

⁹² *Youngs v. Hall*, 9 Nev. 212.

⁹³ *Hammer v. State*, 44 N. J. L. 667.

⁹⁴ *Ross v. Winsor*, 48 N. J. L. 95.

transfer, in certain counties, of property for the public convenience.”⁹⁵

§ 297. The prohibition of special legislation “where a general law can be made applicable.”—In a number of states we find provisions forbidding special legislation in all cases where a general law can be made applicable. Courts have with practical unanimity held that it was for the legislature to determine whether or not a general law could be made applicable in a particular case.⁹⁶ But the evident disposition of the legislatures to extend the exception beyond its proper limits has led to the enactment of amendments in some states declaring it to be a judicial question. Thus, the constitution of Minnesota now provides⁹⁷ that “whether a general law could have been made applicable in any case is hereby declared to be a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject.” The language has generally been given a liberal construction for the purpose of advancing the legitimate purposes of ordinary legislation. A contrary construction, instead of placing on the legislature a wholesome limitation, as is the manifest intention, would result in an

⁹⁵ *Loftus v. F. & M. N. Bank*, 133 Pa. St. 97, 19 Atl. 347.

⁹⁶ *State v. Hitchcock*, 1 Kan. 178; *Beach v. Leahy*, 11 Kan. 23; *Commissioners v. Shoemaker*, 27 Kan. 77; *Hughes v. Milligan*, 42 Kan. 396, 22 Pac. 313; *Commissioners v. Smith*, 48 Kan. 331, 29 Pac. 565; *Edmonds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970; *State v. County Court*, 50 Mo. 317, 11 Am. Rep. 415; *State v. County Court*, 51 Mo. 83; *Hall v. Bray*, 51 Mo. 288; *City of St. Louis v. Shields*, 62 Mo. 247; *Little Rock v. Parish*, 36 Ark. 166; *Davis v. Gaines*, 48 Ark. 370; *Owners of Land v. People*, 113 Ill. 296; *Wilson v. Board, etc.*, 133 Ill. 443, 27 N. E. 203; *People v. McFadden*, 18 Cal. 489, 15 Am. St. Rep. 66; *Brown v. City of Denver*, 7 Colo. 305; *Carpenter v. People*, 8 Colo. 116; *Longworth v. Common*

Council, 32 Ind. 322; *State v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *Kelly v. State*, 92 Ind. 236; *Johnson v. Wells Co.*, 107 Ind. 15; *Wiley v. Blufton*, 111 Ind. 152; *Evansville v. State*, 118 Ind. 426; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595. But in a few cases it has been held to be a judicial question. *Clarke v. Irwin*, 5 Nev. 111, *Hess v. Pegg*, 7 Nev. 23; *Evans v. Job*, 8 Nev. 322. *Ex parte Samuel Pritz*, 19 Iowa, 30, following *Thomas v. Board of Commissioners*, 5 Ind. 4 (subsequently overruled by *Gentile v. State*, 29 Ind. 409).

⁹⁷ Constitution of Minnesota, art. LV, sec. 33, as amended in 1892. To the same effect, Constitution of Missouri of 1875, art. IV, sec. 53, cl. 32, and the constitutions of Alabama and Kansas.

absolute prohibition of special legislation. To give this provision the strictest possible construction of which its language will admit will result in rendering certain necessary legislation impossible, or in causing it to seek refuge under the mere form of general legislation. The provision is not intended to prohibit special legislation, but simply to restrict it to the narrowest field consistent with the practical work of legislation. No general rule can be laid down, but each case must be determined by its peculiar facts and circumstances, interpreted in the light of the intent which the people must be presumed to have entertained when they inserted this saving provision in the constitution.⁹⁸

When a general law could have no other or greater operation than a special law, so that no advantage could be derived nor evil avoided by enacting a law having a general instead of a special operation, a special law is permissible. Hence, where it appeared that there were certain irregularities in the manner of organizing a particular school district under the general law, and no other such case existed in the state, it was held that, although the legislature had no power under the constitution to directly create such a district by a special act, it might provide for a case of this kind by a special law legalizing the defective organization. Such a curative act is a local or special law, but a general law could not be made applicable to the case within the meaning of the constitution.⁹⁹

§ 298. Amendment or repeal of existing special charters.—Constitutional provisions prohibiting special legislation relating to public corporations do not repeal special charters in force at the time of their adoption.¹ Thus, such a charter is not repealed by the adoption of a provision requiring the legislature to provide by general laws for the organization of cities and towns, and to

⁹⁸ In *Richman v. Muscatine Co.*, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, it was said that, "except where it clearly appears that the legislature was mistaken in its belief that a general law could not be made applicable," the courts will not interfere. *Eckerson v. Des Moines*, 137 Ia. 452, 115 N. W. 177. See the earlier Iowa case, *Ex parte Pritz*, 9 Iowa, 30.

⁹⁹ *State v. Squires*, 26 Iowa, 340; *Richman v. Supervisors*, 77 Iowa, 513.

¹ *People v. Cooper*, 83 Ill. 585; *Guild v. Chicago*, 82 Ill. 472; *Comm. v. Reynolds*, 137 Pa. 389, 20 Atl. 1011; *Bitting v. Commonwealth (Pa.)*, 12 Atl. 29. See *Adams v. Beloit*, 105 Wis. 863, 81 N. W. 869, 47 L. R. A. 441.

make provision by general law whereby any city, town or village already incorporated may become subject to the general law.² But where a special law has been enacted for the benefit of a public corporation, subject to adoption or rejection by the inhabitants, it cannot be accepted by the corporation after the adoption of the constitutional provision. Such special law is repealed by the constitutional amendment.³ Where cities elect to retain their special charters after the adoption of a constitutional amendment, it has been held that amendments thereto may be made without violating the constitution.⁴ The weight of authority, however, is to the effect that this power of amendment is simply an evasion of the constitutional provision,⁵ and that under a proper construc-

² *Darrow v. People*, 8 Colo. 426, 8 Pac. 924.

³ *Hinze v. People*, 92 Ill. 406.

⁴ *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455; *People v. Londoner*, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; *Cunningham v. Denver*, 23 Colo. 18, 45 Pac. 356; *Butler v. Lewiston*, 11 Idaho, 393, 83 Pac. 234; *Farnsworth v. Lime Rock R. Co.*, 83 Me. 440, 22 Atl. 373; *Wiley v. Bluffton*, 111 Ind. 152. Citing *Longworth v. Evansville*, 32 Ind. 322; *Evansville v. Bayard*, 39 Ind. 450; *Chamberlain v. Evansville*, 77 Ind. 542; *Eichels v. Evansville Street Railway*, 78 Ind. 261, 41 Am. Rep. 561; *Warren v. Evansville*, 106 Ind. 104; *Bluffton v. Studebaker*, 106 Ind. 129; *Evansville v. Summers*, 108 Ind. 189.

⁵ *Atkinson v. Bartholow*, 4 Kan. 124. In *Ex parte Pritz*, 9 Iowa, 30, it was held that a constitutional provision forbidding local or special laws "for the incorporation of cities and towns" forbade the enactment of special laws for the amendment of acts of incorporation in existence before the adoption of the constitution. Said Wright, C. J.: "In the interpreta-

tion of the constitution as in the interpretation of laws, however, we are to ascertain the meaning by getting at the intention of those making the instrument. * * * There can be no question but that it was designed to confine the legislature to general legislation, and leave the people in their municipal capacity to organize and carry on their government under such general laws. If this be so, then to say that the legislature may not pass a law to incorporate a city, but may to amend an act of incorporation in existence before the adoption of the constitution, or charters under the general law, would make this provision of the constitution practically amount to nothing. For, if they may amend, they may to the extent of passing an entire new law, except as to one section. Or they may at one session amend half the law, and at the next the other half, and thus the plain and positive prohibition of the fundamental law would be evaded. By such a construction the evil sought to be prohibited would continue, if possible, in a more objectionable form."

tion the legislature has neither the power to amend⁶ nor to repeal⁷ pre-existing special charters. Any change in a special municipal charter is a regulation of the internal affairs of a municipality.

⁶ Davis v. Woolnough, 9 Iowa, 104; State v. Cincinnati, 20 Ohio St. 18; Baker v. Steamboat, 14 Iowa, 214. ⁷ Tiger v. Morris Co. Common Pleas, 42 N. J. L. 631.

CHAPTER XXI.

LIABILITIES IN TORT.

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§ 299. **Liability in general.**—An officer charged with discretionary power is not responsible in damages for the way in which he uses his discretion, unless it be shown that he has acted arbitrarily and in clear violation of law.¹ It is a general rule that an action for neglect of an official duty can be maintained only when the neglected duty is a ministerial one, and the officer has no discretion as to the performance of it.

“There are, however, many cases of powers not discretionary,

¹ *Boutte v. Emmer*, 43 La. Ann. for arrest without warrant, see 980, 15 L. R. A. 63. As to liability note in 8 L. R. A. 529.

for the manner of whose performance there can be no responsibility to individuals. The sheriff, for example, is under no responsibility to individuals for any neglect of duty in respect to the execution of a convict, though in such a matter he is allowed no discretion. Plainly it is not only because duties are discretionary that officers are exempt from civil suits in respect to their performance. No man can have any ground for private action until some duty owing to him has been neglected. * * *

The rule of official responsibility then may be stated thus: If the duty imposed upon an officer is a duty to the public, a failure to perform it or an inadequate or erroneous performance is a public injury, and must be redressed, if at all, in some form of public prosecution. But if, on the contrary, the duty is a duty to an individual, then the neglect to perform it properly is an individual wrong, and may support an individual action for damages.² Immunity from private suits depends not upon the grade of the office but upon the nature of the duty. A policeman, for example, is one of the lowest in grade of public officers, but if, by reason of his neglect of duty, a breach of the peace results and loss accrues to an individual, the latter cannot hold him liable for his neglect. If a highway commissioner declines to lay out a road which an individual desires, or discontinues one which it is for his interest to have retained, there is a damage to the individual, but no wrong to him. Damage alone does not constitute a wrong.³ If the officer fails to regard sufficiently the interests of individuals in his official actions under a duty only to the public in general, it is a wrong of which the state alone can complain.⁴

§ 300. Liability of officers acting judicially.—The rule that judicial officers cannot be held personally liable for the improper or erroneous exercise of judicial judgment when acting within their jurisdiction⁵ shields the members of an equalizing board, or board of review of assessments, from liability for damages for corruptly and oppressively increasing the valuation of certain

² Cooley, *Elements of Torts*, 146; *Moss v. Cummings*, 44 Mich. 359; *Bennett v. Whitney*, 94 N. Y. 302.

³ *Butler v. Kent*, 19 Johns. 223, 10 Am. Dec. 219; *Waterer v. Freeman*, Hob. 266.

⁴ *Bartlett v. Crozier*, 17 Johns. 449, 8 Am. Dec. 429.

⁵ *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 395, 6 Am. Dec. 290, annotated; *Mostyn v. Fabrigas*, Cowp. 161, Smith's L. C. 1027; *Jordan v. Hansom*, 49 N. H. 199, 6 Am. Rep. 508.

property.⁶ The same rule protects inspectors of fruits and meats acting in the interest of the public health;⁷ assessors on whom is imposed the duty of valuing property for the purpose of a levy of taxes;⁸ officers empowered to lay out, alter and discontinue highways;⁹ members of a town board in deciding upon the allowance of claims,¹⁰ and all officers exercising judicial powers, whatever they may be called. The members of a board of street commissioners, in determining upon work and adopting plans and specifications therefor, act as judicial officers and are amenable only to the public for errors, negligence or misfeasance in the matters within their jurisdiction. But if, after adopting the plans and specifications, they undertake to carry them out practically and to do the work themselves, employing agents and servants, they are liable to third persons for negligence or misfeasance, as they act in a ministerial capacity.¹¹ The tendency is toward abolishing the distinction between the liability of judges of superior and inferior courts. Thus, it is held that a justice of the peace is protected from personal liability for judicial acts in misjudging his jurisdiction if he acts in good faith.¹² So a constable is not liable for executing a writ on a justice's judgment if the justice is not liable.¹³ A mayor is not liable for an erroneous order maliciously made if the making of such an order was within his jurisdiction.¹⁴

§ 301. Liability of recorder of deeds.—With regard to certain offices, the public is incidentally benefited by the performance of duties to individuals, instead of individuals being indirectly benefited by the performance of public duties. For example, the recorder of deeds is a public officer; but in recording

⁶ *Steele v. Dunham*, 26 Wis. 393.

⁷ *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. 867.

⁸ *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Cooley on Taxation*, 551 *et seq.*

⁹ *Sage v. Laurain*, 19 Mich. 137.

¹⁰ *Wall v. Trumbull*, 16 Mich. 228.

¹¹ *Robinson v. Rohr*, 73 Wis. 436, 2 L. R. A. 366.

¹² *Austin v. Vrooman*, 128 N. Y. 229, 14 L. R. A. 138, annotated; *Williamson v. Lacy*, 86 Me. 80, 25

L. R. A. 506; *Thompson v. Jackson*, 93 Iowa, 376, 27 L. R. A. 92, annotated; *Bishop, Non-Contract Law*, § 783; *Brooks v. Morgan*, 86 Mich. 576. See *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Houlden v. Smith*, 3 Moore, P. C. C. 75; *Grimon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.

¹³ *Thompson v. Jackson*, 93 Iowa, 376, 27 L. R. A. 92.

¹⁴ *Scott v. Fishbate*, 117 N. C. 265, 30 L. R. A. 696.

conveyances or notices, and in furnishing abstracts from the record to those who request them and tender the legal fees, he performs duties directly toward individuals. The breach of the duty is consequently a wrong to the individual, and a right to private action follows as of course.¹⁵ By refusing to record a conveyance tendered to him for that purpose with the proper fees, or if, having undertaken to record the instrument, he records it inaccurately, the recorder commits an actionable wrong. There is a conflict of authority on the question as to who is entitled to maintain an action for damages resulting from recording an instrument incorrectly. As between the grantee in a deed incorrectly recorded and another person claiming under a subsequent conveyance by the same grantor which has been recorded while the first record remained uncorrected, it has been held that the grantee in the first deed is not to be prejudiced by the recorder's error.¹⁶ So under a statute which made the deed operative as a record from the time it was delivered by the grantee for the purpose, a similar ruling was made.¹⁷ Probably, however, the cost of the new record would be the measure of recovery, unless the erroneous record stands in the way of a sale by the grantee, or in some such way works actual damage. If, however, the deed were lost or destroyed, the grantee's title would incur a double danger, and the question of remote and proximate cause would be involved. But in many of the states by statute a purchaser is bound to look no farther than the record, and he must suffer whose deed has been incorrectly recorded.¹⁸ A recorder may be responsible for recording papers not entitled to record if he is aware that the record is unauthorized and if it may cause a legal injury.¹⁹ He is liable also if he gives an erroneous certificate, when it is his duty to give it and the person has a right to it, that being an official act. But if the giving of the certificate is not an official act he is not liable.²⁰ And whatever liability is incurred in such a

¹⁵ *Clark v. Miller*, 54 N. Y. 528;
Kieth v. Howard, 24 Pick. 292.

¹⁶ *Merrick v. Wallace*, 19 Ill. 486.
 See *Ritchie v. Griffiths*, 1 Wash.
 429, 25 Pac. 431, 22 Am. St. 155, 12
 L. R. A. 384.

¹⁷ *Mims v. Mims*, 35 Ala. 23;
Chandler v. Scott, 127 Ind. 226, 10
 L. R. A. 375.

¹⁸ *Ramsey v. Riley*, 13 Ohio, 157.

¹⁹ *Van Schaick v. Sigel*, 60 How.
 Pr. 122; *Mallory v. Ferguson*, 50
 Kan. 685, 22 L. R. A. 99 and note.

²⁰ *Mallory v. Ferguson*, *supra*;
Frost v. Beekman, 1 Johns. Ch.
 288.

case is to the person for whom the certificate is made and not to his grantee.²¹

§ 302. Liability of sheriff.—A sheriff in serving a civil process is charged with duties only to the parties to the proceeding. He is liable to the plaintiff ²² for refusal or neglect to serve process, or want of diligence in such service, or for neglect or refusal to return process,²³ or for making a false return,²⁴ or for neglect to pay over moneys collected.²⁵ If the officer has levied upon property he must keep the property with reasonable care, and his breach of this duty affords ground for an action on behalf of each party to the writ.²⁶ If the sheriff is directed to levy upon goods of a person named, he must at his peril ascertain who the real defendant is and make service upon him.²⁷ In deciding as to the identity of the real owner he is not exercising a judicial function, and is liable if on execution against one person he by mistake seizes the goods of another. A sheriff is generally responsible for the misfeasance or non-feasance of his deputies. The deputy, however, is not such a private agent as to make the sheriff responsible when the deputy is employed to do something because of his office which the law does not require the sheriff

²¹ See *Satterfield v. Malone*, 35 Fed. Rep. 445, 1 L. R. A. 35. For rulings on this point under the statutes of the respective states see the following cases: *Mims v. Mims*, 35 Ala. 23; *Fouche v. Swain*, 80 Ala. 153; *Oats v. Walls*, 28 Ark. 244; *Myers v. Spooner*, 55 Cal. 262; *Weese v. Barker*, 7 Colo. 181; *Hine v. Robbins*, 8 Conn. 347; *Shepherd v. Burkhalter*, 13 Ga. 447; *Benson v. Green*, 80 Ga. 230; *Cook v. Hall*, 6 Ill. 579; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Gilchrist v. Gough*, 68 Ind. 588; *Miller v. Bradford*, 12 Iowa, 19; *Miller v. Ware*, 31 Iowa, 524; *Poplin v. Mundell*, 27 Kan. 159; *Payne v. Pavey*, 29 La. Ann. 116; *Lewis v. Koltz*, 39 La. Ann. 259; *Handley v. Howe*, 22 Me. 562; *Hill v. McNichol*, 76 Me. 315; *Bryden v. Campbell*, 40 Md. 338; *Gillespie v. Rogers*, 146 Mass. 612; *Sinclair*

v. Slawson, 44 Mich. 127; *Parrott v. Shaubhut*, 5 Minn. 331; *Terrill v. Andrew Co.*, 44 Mo. 309; *Converse v. Porter*, 45 N. H. 399; *Musser v. Hyde*, 2 W. & S. 314; *Shelle v. Bryden*, 114 Pa. St. 147; *Throckmorton v. Price*, 28 Tex. 609; *Sawyer v. Adams*, 8 Vt. 172; *Bigelow v. Topliff*, 25 Vt. 282; *Shove v. Larsen*, 22 Wis. 142; *Lombard v. Culbertson*, 59 Wis. 433. See *Ritchie v. Griffith*, 1 Wash. 429, 12 L. R. A. 384, and note.

²² *Howe v. White*, 49 Cal. 658.

²³ *State v. Schar*, 50 Mo. 398.

²⁴ *State v. Finn*, 87 Mo. 310.

²⁵ *Norton v. Nye*, 56 Me. 211; *Nash v. Muldoon*, 16 Nev. 404.

²⁶ *Abbott v. Kimball*, 19 Vt. 551, 47 Am. Dec. 708.

²⁷ *Screws v. Watson*, 48 Ala. 628. See, also, *Thomas v. Markman*, 43 Neb. 843, 62 N. W. 206.

officially to perform, as in serving a distress warrant²⁸ or selling the property on foreclosure of a chattel mortgage.²⁹ The law imposes no duty on a deputy as such. For omissions to act, therefore, he is not responsible, not being bound to act. For tortious acts of a deputy under color of the officer's authority, not only the deputy, but the officer himself, is liable. "Whenever the plaintiff must state the official character of the party sued, as one of the allegations on which the defendant's liability depends, the principal only is responsible. But where the *corpus delicti* is a thing of active wrong and a trespass *per se* unless justified, then the hand that does or procures the act is liable."³⁰ But in cases where deputy-sheriffs are appointed by the sheriff subject to the approval of the judge of the circuit court, his power of appointment comes from the state and his authority is derived from the law.³¹

§ 303. Highway officers.—If a ministerial officer has the funds at his command with which to discharge the duty incumbent upon him, he is responsible to parties injured by his neglect. But he cannot be in fault unless the funds are provided for the purpose, or unless by virtue of his office he may raise the necessary means by levying a tax or in some other mode. Thus, commissioners having charge of the cutting and keeping open of public drains will be liable, after the drains are once cut, if they suffer them to become obstructed to the injury of neighboring lands when they have the means at their command to keep them open.³² The decisions are conflicting as to the liability to individuals of an officer who has charge of the duty of making and repairing highways and public bridges. In an early New York case, where an individual, injured in consequence of a bridge being out of repair, had brought suit against the overseer of highways, it was held that the overseer's duty was owing to the public and not to individuals.³³ This decision has been followed in several states,³⁴ but by later decisions in New York highway

²⁸ Moulton v. Moulton, 5 Barb. 286.

²⁹ Door v. Mickley, 16 Minn. 20 (Gil. 8).

³⁰ Coltraine v. McCaine, 3 Dev. Law (N. C.), 308, 24 Am. Dec. 256.

³¹ State v. Bus, 125 Mo. 335, 33 L. R. A. 616.

³² Child v. Boston, 4 Allen, 41, 81 Am. Dec. 680.

³³ Bartlett v. Crozier, 17 Johns. 449, 8 Am. Dec. 428.

³⁴ See Dunlap v. Knapp, 14 Ohio St. 64; McConnell v. Dewey, 5 Neb. 385; Lynn v. Adams, 2 Ind. 143.

commissioners are held responsible to individuals for failure to keep the public ways in repair if they have the means of repairing them. "Defective bridges are dangerous," said the court in an important case, "and travelers generally have no means of knowing whether they are safe or not. They have to rely upon the fidelity and vigilance of the highway officers, who are the only persons whose duty it is to see that the bridges are in repair."³⁵ A similar liability exists in other states by statute.³⁶

§ 304. Liability of various officers.—The members of a board of health are personally liable in damages to a person afflicted with a contagious disease for injury occasioned by the negligent manner of removing him, and are so liable without proof of malice or of gross negligence.³⁷ A supervisor is personally liable for damages resulting from his neglect to report a claim to a county board after allowance.³⁸ A clerk of court is liable for damages occasioned by his neglect to put a case on the docket,³⁹ and for approving an appeal bond with a penalty less than that required by law,⁴⁰ or for failing to enter a judgment properly.⁴¹ The purchasers of meat who rely upon the inspection of a public inspector may maintain an action against the inspector for damages caused by the neglect of his duty.⁴²

II. PUBLIC CORPORATIONS.

§ 305. Nature of corporation.—In considering the liability of public corporations for torts the distinction between municipal corporations proper, such as chartered cities, and public *quasi*-corporations, such as counties and townships, is of great importance. The question of liability in many cases depends upon the

³⁵ *Hover v. Barkhoof*, 44 N. Y. 113, 125.

³⁶ See *Hathaway v. Hinton*, 1 Jones (N. C.), 243; *County Com'rs v. Gibson*, 36 Md. 229.

³⁷ In *Aaron v. Broils*, 64 Tex. 316, 53 Am. St. Rep. 764, it was held that while the board of health, mayor and marshal of a city might remove from the city persons afflicted with small-pox, they were liable for negligence in doing so, and for removing them in stormy weather and putting them

in an unsafe and unprotected tent, whereby they were so exposed that death ensued.

³⁸ *Clark v. Miller*, 54 N. Y. 528.

³⁹ *Brown v. Lester*, 21 Miss. (13 S. & M.) 392. This, however, was an action on his bond.

⁴⁰ *Billings v. Lafferty*, 31 Ill. 318; *Hubbard v. Switzer*, 47 Ia. 681; *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14.

⁴¹ *Douglass v. Yallup*, Burr. 722.

⁴² *Hayes v. Porter*, 22 Me. 371; *Governor v. Dodd*, 81 Ill. 163.

nature of the corporation, although the real basis for the distinction between the liability of municipal corporations and counties and towns is found in the nature of the duties imposed upon them.

§ 306. Nature of duty.—The distinction between powers of state government, and those exercised solely for corporate interests has been often referred to in the course of this work.⁴³ A municipal corporation exercises both of these classes of powers, while public *quasi*-corporations exercise governmental powers only. As a general rule there is no liability under the rule *respondet superior* for negligence in the exercise of powers of state government.⁴⁴ Hence the liability of a municipal corporation in a particular case may depend upon the nature of the power being exercised. By many authorities, it will be held liable for negligence in the exercise of its strictly corporate powers, but not liable for the same injuries if they occur in the course of performing duties of state government. But the liability in a particular case may be affected by the manner in which the duty is imposed and the means of performance. Careful attention must in all cases be given the statutes of the state, as the common-law rules of liability to which reference is made in this chapter have in many states been very materially modified.

§ 307. Discretionary powers.—A municipal corporation is not liable for injuries caused by the manner in which it exercises a discretion, through its proper officers. Its action or inaction in such a case is final, although it may appear that it seriously misjudged the public interest. Consequently a municipal corporation cannot be held liable to private action for the non-exercise of powers which are not made imperative upon it by statute,

⁴³ See, also, *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Bailey v. New York*, 3 Hill (N. Y.), 531, 38 Am. Dec. 669.

⁴⁴ "It may be stated as an absolute rule, that where the power exercised, or attempted to be exercised, is governmental in its nature, the subordinate body exercising it, whether a municipal corporation or a *quasi*-corporation, or a mere local board attached to one

of these, is no more liable to private action than is the state. This principle is equally applicable to municipal corporations. The nature of the power, whether it be general and governmental or local and private, is the test applied by the courts. Naturally, courts do not agree as to the nature of the same power or function." 1 Andrews, *American Law*, § 382.

but are left to its voluntary decision.⁴⁵ Illustrations of cases in which such corporations are entitled to exercise discretion are found in the change of grade of a street,⁴⁶ opening and closing a street,⁴⁷ making a crossing at a particular place,⁴⁸ or where reasonable and proper police regulations are temporarily suspended to the detriment of individual citizens.⁴⁹

§ 308. Imposed and assumed duties.—The fact that a duty has been voluntarily assumed by the municipality under authority of law is not conclusive as determining the question of liability resulting from negligence of its servants in the performance of the duty. Thus, where a city provides and maintains a workhouse solely for the public service and for the general good in providing for the care and support of offenders for whose maintenance it was responsible, the fact that the city was not compelled by law to provide such an establishment and that it acted voluntarily does not affect its liability for its acts in connection therewith.⁵⁰

§ 309. Liability for acts of officers and employes—Respondeat superior.—A city is not liable for damages resulting from negligence in the course of exercising a delegated power of sovereignty, as an agency of state government.⁵¹ It is not responsible for the torts of a public officer when engaged in the performance of a public governmental duty, nor of a specific duty imposed upon the officer by statute. In the latter case the officer

⁴⁵ *Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712 (annotated); *Hines v. Charlotte*, 72 Mich. 278, 1 L. R. A. 844; *Lincoln v. Boston*, 148 Mass. 578, 3 L. R. A. 257 (annotated); *McDade v. Chester*, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. 681.

⁴⁶ *Transportation Co. v. Chicago*, 99 U. S. 635.

⁴⁷ *Bauman v. Campau*, 58 Mich. 444, 25 N. W. 391, 24 N. E. 781, 21 Am. St. 465.

⁴⁸ *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369.

⁴⁹ See *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105. In this case the city designated a par-

ticular street for coasting. *Henkel v. Detroit*, 49 Mich. 249. See on the general principle, *Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712 (annotated).

⁵⁰ *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 243; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196. See *Tindley v. Salem*, 137 Mass. 171.

⁵¹ *Wood, Master and Servant*, § 463. *Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712 (annotated); *Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270 (annotated); *Hafford v. New Bedford*, 16 Gray. 297.

derives his authority from the law and not from the corporation, and is not in that respect the representative of the corporation.⁵² The doctrine of *respondeat superior* may apply to acts of the agents of a public corporation when acting for the corporation and within the scope of their authority.⁵³

But the corporation is not liable for the acts of officers who are not under its control or engaged in the performance of its duties. The officers may, in such cases, be personally liable for the negligent performance of ministerial duties. When, however, a public officer is engaged in the performance of duties which rest upon the corporation, his acts may bind the corporation in a particular case, although it would not be generally liable for his negligence. Thus, a city is not liable for damages caused by the tortious acts of a policeman, but it may be liable for damages caused by a defect in a street when a police officer has negligently failed to report the defect.⁵⁴ A corporation is liable neither for the acts of independent boards who do not act for it and are

⁵² In *Sievers v. San Francisco*, 115 Cal. 648, the court said: "In a learned and very instructive note to *Goddard v. Hartwell*, 30 Am. St. 373, Mr. Freeman, after careful and critical review and analysis of many authorities, deduces and expresses the rule of liability for the acts of an officer of a municipality in the following language: 'When an officer of a municipality has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort, whereby a citizen is injured either in person or property, the tort is the act of the officer only, and ordinarily no recovery of damages can be had, except against him.'" It was therefore held that the city was not liable for damages occasioned by an erroneous fixing of a street grade eight feet above the official grade. The court further said: "When the injury results from the wrongful act or omission of an officer

charged with a duty prescribed and limited by law, the officer is not treated as the servant or agent of the corporation in the performance of these duties thus expressly enjoined, but is held to be the servant and agent of, and controlled by, the law, and for his acts the municipality will not be held liable."

⁵³ "The question of liability on the part of a municipal corporation for damages arising from the negligent or voluntary but unlawful (or the wilful) acts of officers or employees acting in professed line of duty, always involves the applicability of the doctrine *respondeat superior*, and in cases where the individual is admittedly either directly or indirectly serving the corporation, the further question as to the orbit of duty or scope of employment is involved." *Andrews*, Am. Law, § 412.

⁵⁴ *Kunz v. Troy*, 104 N. Y. 344, 10 N. E. 442.

not subordinate to it, nor for those of subordinate boards which exercise governmental power.⁵⁵ Such independent boards are not, in general, held liable for the negligent acts of their servants.⁵⁶ "To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty, primarily resting upon the municipality."⁵⁷ The manner in which the members of a board are appointed is important, but not decisive upon this question.⁵⁸ "In these cases the question is: Was the offending individual the agent of the city, or of the state, or, if admittedly an officer, was the act merely his act, or an act within the scope of employment; that is, was he serving the state, if so the city is not the superior; if he was serving the city nominally were his services in the governmental orbit or in corporate affairs."⁵⁹

It is not easy to determine when a municipality is liable for the negligence of a contractor. It certainly cannot relieve itself

⁵⁵ *Bulger v. Eden*, 82 Me. 352, 19 Atl. 829; *Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220.

⁵⁶ *O'Leary v. Board of Commissioners*, 79 Mich. 281, 44 N. W. 608, 19 Am. St. Rep. 169; *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 N. E. Rep. 1010; *Anne Arundel County v. Diwell*, 54 Md. 350, 39 Am. Rep. 393 (county commissioners).

⁵⁷ *Ehrgott v. Mayor*, 96 N. Y. 273; *Pettengill v. Yonkers*, 116 N. Y. 558, 22 N. E. 1095. In *O'Brien v. New York*, 15 N. Y. Supp. 520, it is held that under the statute the city is not liable for the negligence of aqueduct commissioners. In *District of Columbia v. Woodbury*, 136 U. S. 450, the District of Columbia was held liable for the negligence of street commissioners who were ultimately responsible to congress. In *Kobs v. Minneapolis*, 22 Minn. 159, the city was held

liable for the negligence of a street commissioner appointed by the common council.

⁵⁸ *District of Columbia v. Woodbury*, 136 U. S. 450. It has been held that the corporation is liable when it appoints the officer and the duty to be performed is for the benefit of the corporation. *New York v. Bailey*, 2 Denio, 433 (engineer and water commissioners); *Tarney v. New York*, 12 Hun. 542 (board of health); *Walsh v. New York*, 41 Hun, 299 (trustees of Brooklyn bridge). So where the duty is imposed upon the corporation and the officers or department acts as the agent. *Niven v. Rochester*, 76 N. Y. 619 (commissioners of public works); *Barnes v. District of Columbia*, 91 U. S. 540 (board of public works); *Ehrgott v. New York*, 96 N. Y. 264 (park commissioners).

⁵⁹ *Andrews*, Am. Law, § 412.

from a positive duty which rests upon it by transferring that duty to a contractor. The corporation must see that absolute and imperative duties which are imposed upon it by law are performed; if it entrusts the observance of such a duty to a contractor and the contractor fails to perform it, the city is responsible for the resulting damages.⁶⁰ But when the negligence relates to a matter with reference to which the corporation is under no special obligation, the liability rests upon the contractor alone.⁶¹ In jurisdictions where the statutory duty to keep streets in proper condition is considered a duty of general government, and is entrusted to officers who act under the direction of statutes, there is no liability on the corporation for acts of negligence of such an officer or of his subordinates and employes engaged in the construction of a street.⁶²

§ 310. Torts in ultra vires undertakings.—The rule that a principal is civilly liable for the acts of his agents when acting in the line of their employment is applicable to municipal corporations, only when the undertaking in which the act occurs is within the powers of the corporation.⁶³ “A municipal corporation is liable for the act of its agents, injurious to others, when the act is in its nature lawful and authorized, but done in an un-

⁶⁰ *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344; *Jefferson v. Chapman*, 127 Ill. 438; *Circleville v. Neuding*, 41 Ohio St. 465; *Hinck v. Milwaukee*, 46 Wis. 565, 32 Am. Rep. 735; *Grant v. Stillwater*, 35 Minn. 242.

⁶¹ *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Harvey v. Hillsdale*, 86 Mich. 330, 49 N. W. Rep. 141; *Van Winter v. Henry County*, 61 Iowa, 684, 17 N. W. 94. See, further, *Herrington v. Lansingburg*, 110 N. Y. 145, 17 N. E. 728; *Depot v. Simmons*, 112 Pa. St. 384. Where a contractor in paving a street unnecessarily deposits earth upon an abutting lot, the corporation is not liable to the owner of the lot. *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. 530.

⁶² *Jensen v. Waltham*, 166 Mass.

344, 44 N. E. 339 (assistant superintendent of streets); *McCann v. Waltham*, 163 Mass. 344, 40 N. E. 20 (laborer employed by superintendent of streets). A city is not liable for acts of its servants in operating a passenger elevator in a city hall. *Snider v. St. Paul*, 51 Minn. 466. A city is bound to give its workmen a reasonably safe place in which to work and is liable to them for damages resulting from a failure to do so, provided the undertaking be one in which the corporation would be liable to third persons. *Norton v. New Bedford*, 166 Mass. 48. But see, *Rhobidas v. Concord*, 70 N. H. 90.

⁶³ *Smith v. Rochester*, 76 N. Y. 506; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *Love v. Raleigh*, 116 N. C. 296, 28 L. R.

lawful manner or in an unauthorized place, but is not liable for injurious and tortious acts, which are in their nature unlawful or prohibited.”⁶⁴ The principle of non-liability of public corporations for torts *ultra vires* is firmly established,⁶⁵ although it is often explained away in practice. It has been held that a town is not liable for damages resulting from building a dam without corporate power⁶⁶ or under an unconstitutional statute.⁶⁷ So

A. 192 (fireworks managed by officers of municipality); *Moffett v. Asheville*, 103 N. C. 237; *Haag v. Vanderburg County*, 60 Ind. 511; *Elliott, Roads and Streets*, p. 355; *McCarthy v. Boston*, 135 Mass. 197; *Seele v. Deering*, 79 Me. 343, 10 Atl. 45.

⁶⁴ *Worley v. Columbia*, 88 Mo. 106.

⁶⁵ The well-known case of *Salt Lake City v. Hollister*, 118 U. S. 256, restricts the doctrine of *ultra vires* when applied to municipal corporations. It was there held that the city could not recover back money paid as a tax for distilling spirits, although the act of engaging in the business was wholly *ultra vires* the corporation. See comment on this case in *Dillon, Mun. Corp.*, II, § 793, note. The doctrine is not consistently applied and municipal corporations are often held liable for *ultra vires* acts. Thus, in *Stanley v. Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216, the city was held liable for damages resulting from its unauthorized act in allowing a steam motor to go upon a street. As to liability when it has granted licenses without authority, see § 339, *infra*. As to liability on *ultra vires* contracts, see § 205, *supra*.

⁶⁶ In *Anthony v. Adams*, 1 Met. (Mass.) 284, the county commissioners ordered a dam built and it

was constructed by the selectmen without a vote or other action of the town. It was held that the town was not liable for negligence in this case.

⁶⁷ *Albany v. Cunliff*, 2 N. Y. 165. But see *Schussler v. Hennepin Co.* 67 Minn. 412, 70 N. W. 6. In *Board of Commissioners v. Duprez*, 87 Ind. 509, Mr. Justice Elliott said: “There is a fatal defect in the complaint. It is not shown that the bridge was one which the county had authority to build. It is settled that a public corporation cannot be held liable for injuries resulting from an act done by its officers beyond its power and jurisdiction. There is in this respect a well-defined distinction between public and private corporations. *Browning v. Board*, 44 Ind. 11; *Haag v. Board*, 60 Ind. 511, 28 Am. Rep. 654; *Driftwood & Co. v. Board*, 72 Ind. 226; *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 226. A public corporation is not liable for injuries caused by the unsafe condition of a bridge which its officers had no authority to build. 2 *Dill. Mun. Corp.* (3d ed.), § 970 (4th ed., § 1017). There is nothing showing that the bridge formed any part of a highway or that the place where it was built was one where the county had authority to build a bridge. Where negligence is the ground of an action against a public corporation,

a city is not liable for the torts of officers committed under the apparent authority of an ordinance which the corporation had no power to enact.⁶⁸ But the corporation is sometimes held liable for acts done by it under a claim of authority which is afterwards shown to be unfounded.⁶⁹ A city is liable for the trespasses or malicious injuries committed by its agents when engaged in the execution of its powers.⁷⁰ The city has no power to call a political meeting, and one who is injured by the careless discharge of a cannon at a meeting called and managed by the city council has no right of action against the city.⁷¹ In the absence of express power a public corporation has no right to expend money for public celebrations, and there is no liability for injuries resulting from the explosion of fireworks on such occasions. It has been held that this is true where the fireworks were exhibited under a permit granted by the municipal authorities under an ordinance prohibiting anything of the kind without such a permit.⁷² Under New York decisions, however, when such exhibi-

it is necessary to show a duty and its breach. Neither a county nor a city can be made responsible for negligence in maintaining a bridge or highway unless there rests upon it some duty."

⁶⁸ *Field v. Des Moines*, 39 Iowa, 575, 579.

⁶⁹ In *Thayer v. Boston*, 19 Pick. (Mass.) 511, the court said: "There is a large class of cases in which the rights of both the public and individuals may be deeply involved in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government or by the nature of the duties and functions with which they are charged by their offices, to act upon the general subject-matter; and es-

pecially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done." To the same effect is *Schussler v. Hennepin Co.*, 67 Minn. 412, 70 N. W. 6.

⁷⁰ *Allen v. Decatur*, 23 Ill. 372; *Manners v. Haverhill*, 135 Mass. 165; *Leeds v. Richmond*, 102 Ind. 372.

⁷¹ *Morrison v. Lawrence*, 98 Mass. 219; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289 (celebration of a holiday under direction of the city); *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805 (where the fireworks were discharged by citizens with the participation of the town officers, who made no attempt to stop it).

⁷² *Fifield v. Phoenix*, 4 Ariz. 283, 24 L. R. A. 430.

tions amount to a nuisance the city is liable for injuries resulting therefrom.⁷³ A city has been held liable for injuries resulting from unlawfully licensing persons to allow a wagon to stand in the street.⁷⁴

The fact that work is being done by the day when the charter requires that it shall be done by contract is no defense to an action for negligence.⁷⁵ A city is liable for trespass in attempting to acquire a lot as a site for a public building in an unlawful manner when it has power to acquire it lawfully.⁷⁶ A city is not liable for injuries received by a prisoner while engaged in working with other prisoners under the direction of the chief of police, who acted without authority in requiring the prisoner to work.⁷⁷

§ 311. Ratification of *ultra vires* acts.—If a corporation is not liable for an *ultra vires* tort because in excess of its power it cannot make itself liable by ratification of the act after it has been done by its agents;⁷⁸ but it may become liable by the adoption or ratification of acts which were beyond the powers of the agents but within the scope of the powers of the corporation. Such ratification may be express or it may be inferred from circumstances such as receiving the benefit of the wrongful act. Thus, a county may become liable for the *ultra vires* acts of its officers by adopting them in its answer.⁷⁹ And it was held that a county which constructed a dam under the authority of an unconstitutional act of the legislature is liable for damages occasioned thereby when it assumes the entire responsibility for the same and asserts the validity of its acts in its answer.⁸⁰

⁷³ The persons were acting under express permission, *Spiers v. Brooklyn*, 39 N. Y. 6, 21 L. R. A. 640. Compare, *Lincoln v. Boston*, 148 Mass. 578, 3 L. R. A. 257.

⁷⁴ *Cohen v. New York*, 113 N. Y. 532.

⁷⁵ *Donahoe v. Kansas City*, 136 Mo. 657; *Collensworth v. New Whatcom*, 16 Wash. 224, 47 Pac. 439.

⁷⁶ *Oklahoma v. Hill (Okl.)*, 50 Pac. 243.

⁷⁷ *Royce v. St. Louis*, 15 Utah, 401, 49 Pac. 290.

⁷⁸ *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; *Mitchell v. Rockland*, 52 Me. 118; *Moore v. New York*, 73 N. Y. 238; *Trescott v. Waterloo*, 26 Fed. 592.

⁷⁹ *Wilde v. New Orleans*, 12 La. Ann. 15.

⁸⁰ *Schussler v. County Commissioners of Hennepin County*, 67 Minn. 412, 70 N. W. Rep. 6. The county not only failed to plead that the acts complained of were *ultra vires*, but adopted and ratified them, and insisted that they were right, proper and legal and

§ 312. **Increase of liability by contract.**—A city cannot lawfully contract to extend its liability for negligence in a particular instance beyond that imposed by the law. Hence, a contract entered into between a city and a party from whom it purchased a right of way, to the effect that the city would have the sewer so constructed as to prevent water from flowing back on the grantor's premises, was held void in so far as it assumed to guaranty the grantor against damages, without reference to the manner in which the work of the city was done.⁸¹ A city is not liable for a failure to extinguish fires,⁸² although it owns the water-works and receives an income therefrom; and in the absence of an express charter authority a contract imposing such liability upon the city is void.⁸³ Where an action was brought against the city based upon the neglect of the water-works company to supply sufficient water to extinguish a fire, and it appeared that the city had taken from the water-works company a bond to indemnify it against damages that might result from the water company's negligence in the construction and manage-

performed under a public necessity. The court said: "This is therefore not a mere act of negligence of the board of county commissioners in the performance of an official duty, but an active and affirmative tort, done under claim of statutory authority and duty, and justified upon such ground by defendant, and that it was performed within the scope of the board's official duty. * * * It insists upon retaining the benefits of the illegal acts of its officers. It is not willing that the wrong shall cease, but aggressively insists that it will make no reparation for its past tort, and that it has a legal right to enjoy in the future all the benefits secured through an unconstitutional law. * * * We may concede the general rule to be that the defendant would not be responsible for the unauthorized and unlawful acts of its officer done *colore officii*; but when the defend-

ant expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing, it is liable in damages." Citing *Thayer v. Boston*, 19 Pick. (Mass.) 511. The rule of these cases must be regarded as an exception to the general rule that a corporation is not responsible for torts in *ultra vires* undertakings.

⁸¹ *Nashville v. Sutherland*, 92 Tenn. 335, 19 L. R. A. 619, note on *ultra vires*.

⁸² *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660; *Mendel v. Healey*, 28 W. Va. 233, 57 Am. Rep. 664, where the city was empowered to maintain a sufficient number of reservoirs "to supply water in case of fire;" *Grant v. Erie*, 69 Pa. St. 420, 8 Am. Rep. 272.

⁸³ *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785.

ment of its works, the court said:⁸⁴ "Indemnification against liability must always be regarded as having reference to existing grounds of liability and not as serving to create new ones. Besides, the city could not assume liability for negligence in cases where the law did not impose a liability. The contract then must be construed as covering cases only where an action might be maintained against the city independent of the contract."

§ 313. General rules.—Subject to statutory modifications, it may safely be stated as a general rule that:

1. A public corporation is not liable for failing to exercise or for improperly exercising its purely governmental powers.
2. A municipal corporation, when dealing with property held by it as a private owner, is liable as an individual owner.
3. A municipal corporation is liable for negligence in the discharge of ministerial or specified duties, not discretionary or governmental, assumed in consideration of the privileges conferred by its charter, although there are no special awards or advantages.
4. In many states by the common law, and in some states by statute, a municipal corporation is liable for failure to keep streets, alleys, roads, sidewalks and bridges in repair. No such liability rests upon counties and townships at common law.

a. SOLELY GOVERNMENTAL DUTIES.

§ 314. Definition.—Solely governmental duties are such as involve the exercise of governmental power and are assumed for the exclusive benefit of the public. The sovereign acts of a government cannot be submitted to the judgment of the courts. The government is not a subject of private law. "The rule that a tort creates a liability for damages is a rule of private law; it therefore applies to the relations of the private law only. The position of the state, when it acts in the exercise of sovereign and governmental functions, is, however, entirely beyond the

⁸⁴ Van Horne v. Des Moines, 63 Iowa, 447; Becker v. Keokuk Water Works, 79 Iowa, 419. The taking of a bond from a railroad company which is about to lay its tracks in the streets of the city to save the

city harmless from the results of the negligence of the company does not increase the liability of the city. Terry v. Richmond, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834.

sphere of private law, and must be judged by different standards.

* * * Governmental functions do not create civil causes of action."¹ The state, directly or through its corporate agencies, "gives such protection from law-breakers, from fire, from disease and from other common evils as the power, energy and faithfulness of the government shall compass." A person can have no civil action from damages resulting from his being badly governed.²

§ 315. Neglect to enact or enforce laws.—A corporation is not liable for a failure to enact, or neglect to enforce or observe, its own laws and ordinances.³ Hence there is no liability

¹ Freund, "Private Claims against the State," *Political Science Quarterly*, VIII, p. 648.

² Many cases in support of the rule that a municipal corporation is exempt from liability when acting as the agent of the state and exercising governmental power are collected and reviewed in *Donaher v. City of Brooklyn*, 51 Hun (N. Y.), 563, and in *Moffitt v. City of Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810, and note. In *Terry v. Richmond*, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834, the rule is thus stated: "The duty of a municipal corporation to see that the streets and sidewalks are in a safe condition, and its sewers and drains are kept in good order, and that its other like municipal obligations are cared for, is a purely ministerial and absolute corporate duty, assumed in consideration of the privilege conferred by its charter; and the law holds the municipality responsible for an injury resulting from a negligent discharge of that duty or the negligent omission to discharge it, but exempts it from liability for the exercise of governmental or discretionary powers." *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Petersburg v.*

Applegarth, 28 Gratt. 343, 26 Am. Rep. 357; *Elliott, Roads and Streets*, pp. 504, 532; *Dillon, Mun. Corp.*, II, §§ 1046, 1049; *Tiedeman, Mun. Corp.*, § 349; *Cooley, Torts*, p. 738; *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227; *Eddy v. Granger*, 19 R. I. 105; *Commissioners v. Allman*, 142 Ind. 58.

³ *Harmon v. St. Louis*, 137 Mo. 494, 38 S. W. Rep. 1102; *Fowle v. Alexandria*, 3 Pet. (U. S.) 398; *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532; *Forsyth v. Atlanta*, 45 Ga. 152; *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105. In *Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, the rule is thus stated: "A municipal corporation is an instrumentality of government and is not liable for a failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers. * * * In one thing all unite, and that is in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial or discretionary duty or in simply performing such a duty in an improper method."

for damages resulting from a failure to enforce an ordinance against the use of fireworks,⁴ against allowing sunken vessels to remain in a river,⁵ against allowing swine to run at large,⁶ against nuisances,⁷ against coasting on the streets,⁸ or against the erection of certain kinds of buildings within the fire limits,⁹ or against creating a nuisance.¹⁰

§ 316. Suspension of ordinances.—It rests with the corporation to determine whether it will exercise its governmental powers. It may entirely fail to act or it may temporarily suspend an ordinance without becoming liable for injuries resulting thereby to individuals. Thus, there is no liability when an ordinance is suspended and because of such suspension a fire is started by boys exploding fireworks,¹¹ or for damages caused by a runaway horse which was frightened by fireworks or salutes on a municipal common;¹² or to a person who is injured by cattle allowed to run at

⁴ *McDade v. Chester*, 117 Pa. St. 414, 2 Am. St. 681; *Hubbell v. City of Viroqua*, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 866 (shooting-gallery under a license); *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805.

⁵ *Coonley v. Albany*, 57 Hun, 327.

⁶ *Levy v. New York*, 1 Sandf. (N. Y.) 465. But a city may be liable for allowing cattle to run at large in the streets under circumstances which amount to a nuisance. *Cochrane v. Frostburg*, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728. In *Mayor v. Marriott*, 9 Md. 174, 66 Am. Dec. 326, it was held that where a statute conferred a power upon a public corporation to be exercised for the public good the exercise of that power is not discretionary but imperative. Hence, in *Cochrane v. Frostburg*, 81 Md. 54, 48 Am. St. 479, a city was held liable for damages caused by a cow running at large in the street where the city had power to restrain by ordinance.

⁷ *Davis v. Montgomery*, 51 Ala.

139; *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1102.

⁸ *Wilmington v. Von Degrift*, 1 Marvel (Del.), 5, 29 Atl. 1047, 25 L. R. A. 538.

⁹ *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1104.

¹⁰ *Moran v. Palace Car Co.*, 134 Mo. 641, 36 S. W. 659, 56 Am. St. 543.

¹¹ *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451.

¹² *Lincoln v. Boston*, 148 Mass. 578, 3 L. R. A. 257. As to liability for injuries caused by the firing of a cannon in a public street with the knowledge of but without the express license of the corporate authorities, see *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857, note. As to liability for failure to prevent a nuisance, see *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Pierce v. New Bedford*, 120 Mass. 534, 37 Am. Rep. 387; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779. A city is liable for injuries to property by an explosion of fireworks under a

large in the streets under a suspended ordinance.¹³ A distinction, however, is sometimes made between the mere suspension of an ordinance and the granting of a license to an individual to do an otherwise forbidden thing.¹⁴

§ 317. Liability for acts of a mob.—In the absence of a statute there is no liability on the part of a public corporation for negligence in failing to protect the lives and property of the citizens from mob violence.¹⁵ In many states, however, statutes have been enacted giving a right of action against a municipality for damages caused by the destruction of property by a mob.¹⁶ The right, however, is purely statutory, and may be taken away at any time before or after the damage has been sustained.¹⁷ A statute providing that the corporation shall be liable for the destruction of property by a mob will not sustain an action for the taking of human life.¹⁸ Usually the statute provides that a party cannot recover if he had previous knowledge of the intended attempt to destroy his property, unless he or his agent gave notice of such intention to the officials whose duty it was

permit constituting a dangerous public nuisance. *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641. This case is not in accordance with the weight of authority. See note to *Scanlon v. Wedger*, in 16 L. R. A. 395; also next section.

¹³ *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787. *Contra*, *Cochrane v. Frostburg*, 81 Md. 54, 31 Atl. 703, 48 Am. St. 479. This decision is apparently on the same ground as those which in New York and states following, hold that a city is liable to travellers injured by failure to repair streets.

¹⁴ *McCaull v. Manchester*, 85 Va. 579, 2 L. R. A. 691.

¹⁵ *Western Reserve College v. Cleveland*, 12 Ohio St. 375; *Robinson v. Greenville*, 42 Ohio St. 625; *Gianfortone v. New Orleans*, 61 Fed. 64, 24 L. R. A. 592 (the authorities are collected in a note to this case); *Hart v. Bridgeport*, 13 Blatchf. 289; *Prather v. Lex-*

ington, 13 B. Mon. 559, 56 Am. Dec. 585.

¹⁶ *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605. In *Allegheny County v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670, it was held that under the statute the county was liable to a non-resident for the value of property destroyed by a mob while passing through the county. *Adamson v. New York*, 188 N. Y. 255.

¹⁷ *State v. New Orleans*, 109 U. S. 285; *New Orleans v. Abagznatto*, 62 Fed. 240, 26 L. R. A. 329. For construction of such a statute, see *Adams v. Salina*, 58 Kas. 246, 48 Pac. 918. For definition of a "riot," see *Aron v. City of Wausau*, 98 Wis. 592, 74 N. W. 354; 2 Whart. Cr. Law (10th ed.), § 1537.

¹⁸ *Jolly v. Hawesville*, 89 Ky. 279; *Gianfortone v. New Orleans*, *supra*, and note.

to guard the property.¹⁹ The party must use due diligence on his own part to prevent the injury,²⁰ but he will not be presumed to have acted illegally or improperly.²¹ The constitutionality of such statutes has been frequently called in question and uniformly sustained.²² It is not the duty of a person to employ an armed force to protect his property, and he cannot be charged with negligence because he declined to take human life. It is no defense under such a statute that the mob was composed of the employees of the plaintiff.²³

§ 318. Acts of police officers.—Police officers act solely in relation to the governmental duty of the state to preserve order, and no liability rests upon the corporation for their negligence in the performance of such duties.²⁴ Thus, a city is not liable

¹⁹ *Allegheny County v. Gibson*, 90 Pa. St. 397; *Moody v. Niagara County*, 46 Barb. (N. Y.) 659.

²⁰ *Chadbourne v. Newcastle*, 48 N. H. 196; *Eastman v. New York*, 5 Robt. (N. Y.) 389; *Underhill v. Manchester*, 45 N. H. 214; *Hill v. Rensselaer County*, 119 N. Y. 344.

²¹ *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605.

²² *Pennsylvania Co. v. Chicago*, 81 Fed. 317; *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Hagerstown v. Sehner*, 37 Md. 180.

²³ *Spring Valley v. Spring Valley*, 65 Ill. App. 571.

²⁴ *Woodhull v. New York*, 150 N. Y. 450; *Taylor v. Owensboro*, 98 Ky. 271; *Gullikson v. McDonald*, 62 Minn. 278; *Kies v. Erie*, 135 Pa. St. 144; *Kimball v. Boston*, 1 Allen, 417; *Calwell v. Boone*, 51 Iowa, 687; *Perkins v. New Haven*, 53 Conn. 214; *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505. In *Culver v. Streater*, 130 Ill. 238, 6 L. R. A. 270, the court said: "Police officers appointed by the city are not its agents or servants so as to render it responsible for their un-

lawful or negligent acts in the discharge of their duties. Accordingly it has been held that the city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city (*Buttrick v. Lowell*, 1 Allen, 172); nor for illegal and oppressive acts of officers committed in the administration of an ordinance (*Odell v. Schroeder*, 58 Ill. 353); nor for an arrest made by them which is illegal for want of a warrant (*Pollock v. Louisville*, 13 Bush, 221; *Cook v. Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 290); nor for their unlawful acts of violence, whereby in the exercise of their duty in suppressing an unlawful assemblage an injury is done to the property of an individual (*Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 219; *Dargan v. Mobile*, 31 Ala. 469)." There is no liability for acts of police when attempting to enforce an illegal ordinance. *Easterly v. Town of Irwin*, 99 Iowa, 694, 68 N. W. 919. No liability of city to one who is injured while aiding the police to make an arrest.

for damages resulting from an unlawful arrest;²⁵ the act of a drunken policeman in assaulting a citizen;²⁶ allowing a horse to escape and be killed while attempting to make an arrest for fast driving;²⁷ nor the wanton and malicious killing of a dog under the pretense of enforcing an ordinance.²⁸ So where an officer whose duty it is to kill unmuzzled dogs, by his recklessness in attempting to discharge such duty injures an individual, the corporation is not liable for damages.²⁹

§ 319. Prevention of fires.—The obligation to prevent the destruction of property by fire is solely governmental.³⁰ “As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary local conveniences of the people, and in exercising these discretionary functions the corporations are not called upon to respond in damages to individuals either for omissions to act or for the mode of exercising powers conferred on them for public purposes and to be exercised at discretion for the public good.”³¹ The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their protection from a common danger.³² A city is not an insurer of the property of its inhabitants. The extent and manner of the exercise of the power to prescribe regulations governing a fire department must necessarily be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such power the corporation cannot be

Cobb v. Portland, 55 Me. 381, 92 Am. Dec. 598. The exemption of the corporation extends to injuries caused by negligence in the care of a building for the police department. *Wilcox v. Rochester*, 190 N. Y. 137.

²⁵ *Attaway v. Cartersville*, 68 Ga. 740; *Peters v. Lindsborg*, 40 Kan. 654; *Gullikson v. McDonald*, 62 Minn. 278; *City of Caldwell v. Prunelle*, 57 Kan. 511. The policeman is personally liable for making a malicious arrest. *Bolton v. Velines*, 94 Va. 393, 26 S. E. 847.

²⁶ *McElroy v. Albany*, 65 Ga. 387, 38 Am. Rep. 791. Nor for unneces-

sary violence in making an arrest. *Calwell v. Boone*, 51 Iowa, 687.

²⁷ *Elliott v. Philadelphia*, 75 Pa. St. 342, 15 Am. Rep. 591.

²⁸ *Moss v. Augusta*, 93 Ga. 797.

²⁹ *Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270; *Whitefield v. Paris*, 84 Tex. 431, 15 L. R. A. 783 (annotated).

³⁰ *Edgerly v. Concord*, 59 N. H. 78; *Welsh v. Rutland*, 56 Vt. 228; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760.

³¹ *Edgerly v. Concord*, 62 N. H. 8.

³² *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368.

held liable to individuals.⁸³ It is not, therefore, liable for neglect of duty on the part of fire companies or their officers charged with the duty of extinguishing fires. When a municipal corporation undertakes to furnish water to be used as a protection against fire, it acts in its governmental capacity, and is not liable in damages for injury caused by lack of water or a defect in the hydrants or other machinery of the fire or water department. By accepting a statute authorizing the maintenance of a system of water-works and constructing its water-works under it, a city does not "enter into any contract with or assume any liability to the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained."⁸⁴

§ 320. Destruction of property to prevent spread of fire.— By the common law, under the principle expressed in the maxim *salus populi suprema lex*, an individual or a corporation might destroy houses or other private property to prevent the spread of a conflagration without being responsible to the owner for the value of the property so destroyed.⁸⁵ Thus, Lord Coke says: "For the Commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire."⁸⁶ This every man may do without being liable for an action." It must appear, however, that there was a reasonable necessity for such destruction.⁸⁷ It is not uncommon for the law to designate certain officers who are to determine when an emergency exists and to order the destruction of private prop-

⁸³ *Mendel v. Wheeling*, 28 W. Va. 253, 57 Am. Rep. 665; *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Van Horne v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750; *Grant v. Erie*, 69 Pa. St. 420, 8 Am. Rep. 272; *Patch v. Covington*, 17 B. Mon. (Ky.) 722, 66 Am. Dec. 186; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Howsman v. Trenton Water Co.*, 119 Mo. 304, 23 L. R. A. 146 (annotated).

⁸⁴ *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Springfield Fire Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660, and cases cited in preceding note.

⁸⁵ *Bowditch v. Boston*, 101 U. S. 16; *McDonald v. Red Wing*, 13 Minn. 38; *Field v. Des Moines*, 39 Iowa, 575.

⁸⁶ *Mouse's Case*, 12 Coke, 13, 63.

⁸⁷ In *Bishop v. Macon*, 7 Ga. 200, 50 Am. Dec. 400, it was held that the property owner could maintain an action against the city in *assumpsit* for the value of property that might have been saved; but this decision has been questioned. See cases cited in next note.

erty under such circumstances. Corporations are also frequently made liable by statute for the value of property thus destroyed.³⁸ It must appear clearly that there is an intention to charge the corporation, and the party seeking his remedy must proceed under the statute.³⁹ The destruction of property under a necessity of this nature is not the taking of private property for public use for which compensation must be made under the constitution.

§ 321. **Acts of firemen.**—The officers and men of a city fire department are public officers or agents for whose negligence the corporation is not liable.⁴⁰ This is true whether the injury for which it is sought to recover damages results from the negligent acts or omissions of firemen while engaged in their proper duty of extinguishing fires, in keeping the department apparatus in order,⁴¹ or in the management and care of the appliances of the department when not in actual service. Thus, there can be no recovery for the value of property destroyed by fire started by sparks escaping from a steam fire-engine while used in extinguishing a fire;⁴² nor for an injury to a person resulting from the bursting of hose;⁴³ nor for damages caused by a runaway horse frightened by the escape of steam from a fire-engine;⁴⁴ nor for an injury resulting from the negligent driving of a fireman on the way to a fire;⁴⁵ nor for injuries inflicted while the firemen are

³⁸ For a full discussion of general questions of liability, see *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; *McDonald v. Red Wing*, 13 Minn. 38 (Gil. 25).

³⁹ *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613. In *People v. Brisbane*, 76 N. Y. 558, 32 Am. Rep. 337, it was held that where the statute provides that compensation shall be made for a building blown up or destroyed by order of a designated officer, the owner of another building across the street which was wrecked by the explosion, but which was not intended to be destroyed, cannot recover, although the destruction of his building was the natural and probable result of the explosion.

⁴⁰ *Grube v. St. Paul*, 34 Minn.

402; *Wilcox v. Chicago*, 107 Ill. 337, 47 Am. Rep. 434, and cases cited in following notes. The rule *respondeat superior* has no application in such a case. *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

⁴¹ *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

⁴² *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760.

⁴³ *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

⁴⁴ *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788.

⁴⁵ *Wilcox v. Chicago*, 104 Ill. 334, 47 Am. Rep. 434; *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263.

practicing in the streets⁴⁶ or engaged in a parade,⁴⁷ or thawing a hydrant,⁴⁸ or by allowing a ladder to project from an engine house over the sidewalk.⁴⁹ The fact that firemen engaged in the extinguishing of fires are members of a voluntary association and not paid firemen does not change the rule as to the liability of the city for their negligence.⁵⁰ The city is not liable for the negligence of the members of a fire patrol⁵¹ nor of a board of fire commissioners.⁵² There may, however, be instances where, on other grounds, a corporation is liable in damages for injuries resulting from the negligent acts of its firemen or police officers. Thus, a city may be liable for damages resulting from an obstruction wrongfully placed and allowed to remain in a highway by a fire department because of its duty to keep its streets in a safe condition.⁵³ It is the duty of the corporation to keep the highway safe for the use of travelers, and a city is liable for damages resulting from negligently allowing a nuisance to exist in a highway after due notice thereof. Hence, if a police officer leaves a trap-door open in a sidewalk in front of a police station, and as a result an individual is injured, the city is liable.⁵⁴ This liability, however, is based not upon the act of the officer, but upon the negligence on the part of the city in failing to care for its property.

§ 322. Boards of health—Care of hospitals.—The duties of a board of health, or of boards in charge of hospitals or of other charitable medical service, are public and not corporate, and the city is therefore not liable for negligence of officers in the dis-

⁴⁶ *Thomas v. Findley*, 6 Ohio C. C. 241; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 349.

⁴⁷ Rope drawn across the street. *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

⁴⁸ *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

⁴⁹ *Dodge v. Granger*, 17 R. I. 664. For further illustrations of the principle see cases cited in note to this case, in 15 L. R. A. 781.

⁵⁰ *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 395.

⁵¹ *Boyd v. Insurance Patrol of Philadelphia*, 113 Pa. St. 269. In

Newcomb v. Boston Protection Dept., 151 Mass. 215, 24 N. E. 39, it was held that such an organization was a private corporation and liable for the negligence of its agents.

⁵² *O'Leary v. Board*, 79 Mich. 281, 7 L. R. A. 170.

⁵³ See opinion of Tillinghast, J., in *Dodge v. Granger*, 17 R. I. 664, 15 L. R. A. 781.

⁵⁴ *Carrington v. St. Louis*, 89 Mo. 208. The personal knowledge of the policeman was held to be sufficient notice to the corporation of the dangerous condition of the sidewalk.

charge of such duties.⁵⁵ Hence, a city is not liable for negligence of those in charge of its public hospitals,⁵⁶ or engaged in handling garbage;⁵⁷ nor is a county liable for the negligence of the county physician.⁵⁸ Where the board of health is a separate body, its members and officers are not the agents of the corporation, and their negligence is not its negligence. Hence, the neglect or carelessness of a quarantine officer upon whom the public imposes the duty of preventing the spread of disease creates no liability against the corporation.⁵⁹

§ 323. Care of criminals.—A city is not liable to a person who is confined in a city prison for damages occasioned by negligence of the officers or the bad sanitary condition of the prison.⁶⁰ Nor is it liable for injuries occasioned by the destruction of a jail by fire occasioned by the negligence of its officers.⁶¹ Nor is a county liable for injuries caused by defective machinery used in a state prison;⁶² nor for the death of a convict due to the negligence of a foreman.⁶³ The city is not liable for personal injuries

⁵⁵ *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. 64; *Orlando v. Pragg*, 31 Fla. 111, 34 Am. St. 17, 25; *Whitfield v. Paris*, 84 Tex. 431, 31 Am. St. 69, note; *Hughes v. Monroe County*, 147 Ill. 49.

⁵⁶ *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13; *Brown v. Vinalhaven*, 65 Me. 402; *White v. Marshfield*, 48 Vt. 20.

⁵⁷ *Kuehn v. Milwaukee*, 92 Wis. 263.

⁵⁸ *Summers v. Davis County*, 103 Ind. 263; *Sherbourne v. Yuba County*, 21 Cal. 113; *Bates v. Houston*, 14 Tex. Civil App. 287, 37 S. W. 383.

⁵⁹ *Forbes v. Escambia Board of Health*, 28 Fla. 26, 13 L. R. A. 549. In *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499, the plaintiff was asked by the health officer to assist in moving a coffin which contained the body of a person who had died of the smallpox, which was known to the officer. The plaintiff caught

the disease, and from him it was contracted by his children. It was held that he had no cause of action against the city for their death.

⁶⁰ *Hughes v. Lawrenceburg*, 18 Ky. Law. 550, 37 S. W. 257; *La Clef v. City of Concordia*, 41 Kan. 323, 13 Am. St. 385; *Lindley v. Polk County*, 84 Ia. 308, 50 N. W. 975; *Gulliken v. McDonald*, 62 Minn. 278. But see *Shields v. Durham*, 118 N. C. 450. In Virginia incorporated cities and towns, but not counties, are required to exercise the same care over prisons as over their streets and sewers, and are liable for negligence. *Edwards v. Pocahontas*, 47 Fed. 268.

⁶¹ *Brown v. Guyandotte*, 34 W. Va., 299, 12 S. E. 707, 11 L. R. A. 121; *Hughes v. Lawrenceburg*, 18 Ky. Law, 550, 37 S. W. 257.

⁶² *Alamango v. Albany County*, 25 Hun (N. Y.), 551.

⁶³ *Nisbit v. Atlanta*, 97 Ga. 650. See *Royce v. Salt Lake City*, 15 Utah, 401, 49 Pac. 290.

suffered by an inmate of the city work-house while engaged in unloading coal, although the city derives a certain amount of revenue from the employment of the inmates of the prison.⁶⁴

§ 324. Care of the indigent.—When a public corporation undertakes to care for the poor, it acts in its governmental capacity and is not liable for negligence in connection therewith.⁶⁵

§ 325. Care of school buildings.—A public quasi-corporation, acting on behalf of the state and having no separate fund, is not liable for negligence in the care of the school buildings.⁶⁶ Thus, such a corporation is not liable for an injury caused by a broken lightning rod⁶⁷ or an uncovered cellar.⁶⁸ School trustees are state officers and not the agents of the corporation. In some cases a liability exists on the part of the officers, but trustees are not liable unless they have some means of providing funds for keeping the property in repair.⁶⁹ The question of the liability of a municipal corporation which owns its school buildings and has a fund from which to provide for their care will be considered hereafter.

b. SOLELY CORPORATE DUTIES.

§ 326. Rule of liability for negligence.—The rule is settled that when municipal corporations are not acting in the exercise

⁶⁴ *Curran v. Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243. In this case the court, after stating the rule that municipal corporations are not liable in private actions for omissions or neglect in the performance of a public duty imposed by law, nor for that of their servants engaged therein, said: "Nor do we perceive any reason why the city should be held responsible because some revenue is derived from the labor of the inmates. It is required by the statute that these inmates should be kept at work, but the institution is not conducted with a view to pecuniary profit." Compare, *Neff v. Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500; *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308.

⁶⁵ *Maximilian v. Mayor*, 62 N. Y. 160 (commissioners of charities); *Brennan v. Guardians of Limerick Union*, L. R. 2 C. L. 42. As to negligence in care of poor-farm, see *Neff v. Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500; *Symonds v. Clay County*, 71 Ill. 355 (injuries caused by fire in the poor-house).

⁶⁶ *Lane v. Woodbury*, 58 Iowa, 462.

⁶⁷ *Donovan v. Board of Education*, 85 N. Y. 117.

⁶⁸ *Diehm v. Cincinnati*, 25 Ohio St. 305; *Hamm v. New York*, 70 N. Y. 460.

⁶⁹ *Finch v. Board of Education*, 30 Ohio St. 37.

of their purely governmental functions, for the sole and immediate benefit of the public, but are exercising as corporations private franchises, powers and privileges, which belong to them for their immediate corporate benefit, or dealing with property held by them for their corporate advantage, for a profit, although it inures ultimately to the benefit of the general public, they become liable for the negligent exercise of such powers precisely as are individuals.⁷⁰

§ 327. As owner of property used for purposes of a private nature.—When a corporation is the owner of property which it devotes principally or incidentally to purposes of a private nature, such as the making of income, it is chargeable with the same duties and obligations in respect thereto as if it were a private corporation or individual.⁷¹ Thus, if it so manages a market as to render it a nuisance it is liable in damages to those who are injured thereby.⁷² So, if it maintains a farm, in order to more economically support its poor, it is liable for injuries caused by its negligence in connection therewith.⁷³ A municipal corporation is not ordinarily liable to individuals for the manner in which it cares for a public building, but if instead of using the building for public purposes exclusively it rents a portion of it for private purposes, and receives an income therefrom, it is liable for its negligence in and about the building in the same manner as though it owned the property in its private corporate capacity.⁷⁴ A city is responsible in damages for the death of a

⁷⁰ Shearman & Redfield, Neg., § 286; Jones, Neg. of Mun. Corp., ch. 5; Dillon, Mun. Corp., § 954; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762.

⁷¹ Oliver v. Worcester, 102 Mass. 489. And see note to Riddell v. Proprietors (7 Mass. 169) in 5 Am. Dec. 43.

⁷² Suffolk v. Parker, 79 Va. 660, 52 Am. Rep. 640, and cases cited in note; Weymouth v. New Orleans, 43 La. Ann. 344. In Barron v. Detroit, 94 Mich. 601, 19 L. R. A. 452, it was held that where no duty rested upon the corporation to construct a market, it was liable for the same degree of care, in respect

to plans and construction, as private individuals.

⁷³ Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308. The injury was caused by a ram kept by the town for breeding purposes, but negligently allowed to run at large. Compare, Hollenbeck v. Winnebago Co., 95 Ill. 148, 35 Am. Rep. 151, and note; French v. Boston, 129 Mass. 592.

⁷⁴ Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185. Oliver v. Worcester, 102 Mass. 489. In this case a city let rooms in the basement of its city hall for rent. It was held liable to a person injured by defective condition of the

child caused by the dangerous condition of a lot owned by the city and but partially inclosed from the street.⁷⁵ When a city owns a cemetery and derives an income therefrom, it is liable for damages caused by a lack of due care in its management.⁷⁶

§ 328. Illustrations—Wharves.—When a city owns and receives an income from wharves it must keep them in a condition suitable for use, and is hence liable for damages resulting from a want of care in this respect.⁷⁷ This applies to the approaches to a dock or pier of which the corporation has charge,⁷⁸ and the duty is toward all persons approaching the same from the land or from the water.⁷⁹

§ 329. Private business enterprises—Gas and water.—When a municipal corporation engages in a business enterprise or undertakes to carry on any business or perform any work for its citizens for compensation, it is held to the same responsibility for negligence that the law imposes upon private corporations doing the same or similar work.⁸⁰ This principle applies where the corporation maintains a public wash-house and renders it liable for injuries caused by defective machinery used therein.⁸¹ So, if the corporation manufactures and sells gas for a compensation, it is liable in the same manner as a private corporation.⁸²

surrounding grounds. *French v. Quincy*, 8 Allen, 9; *Moulton v. Scarborough*, *supra*; *Neff v. Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500. Degree of care required in construction of a building, see *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504.

⁷⁵ The lot was allowed to become flooded with water in which the child was drowned. *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206. See *Seben v. Chicago*, 165 Ill. 371; *Omaha v. Richards*, 49 Neb. 244.

⁷⁶ *Toledo v. Cone*, 41 Ohio St. 149.

⁷⁷ *Seaman v. New York*, 80 N. Y. 239; *Willey v. Allegheny City*, 118 Pa. St. 490.

⁷⁸ *Barber v. Abendroth*, 102 N. Y. 406.

⁷⁹ *Kennedy v. New York*, 73 N. Y. 365.

⁸⁰ *Jones*, Neg. of Mun. Corp., § 41; *Thompson*, Neg., p. 738; *City Council v. Lombard*, 99 Ga. 282, 25 S. E. 772. But whether the rule stated in the text always applies where the injury is caused by an error of judgment or plan, is doubtful. See *Child v. Boston*, 4 Allen, 41.

⁸¹ *Cowley v. Sunderland*, 6 H. & N. 565.

⁸² *Western Savings Society v. Philadelphia*, 81 Pa. St. 175.

It has been said,⁸³ on the authority of an early New York case,⁸⁴ that when a municipal corporation maintains water-works and supplies water for a compensation, it is engaged in a private enterprise and liable in the same manner as a private corporation.⁸⁵

It has been held that a municipal corporation is liable for damages caused by water escaping from the mains or reservoirs through the negligence of the city; and where the injury was caused by a defective water-box in a street the court said:⁸⁶ "The cause of the accident was the improper condition of the water-box or the negligence of the defendant in maintaining it in a proper condition. This places the neglect upon the defendant, as the owner and manager of the aqueduct, and not as having the supervision of and charged with the duty of repairing the highway at that point. For an injury caused by the failure to repair the highways within the limits the defendant is not liable. But for an injury caused by a failure to properly maintain its aqueduct it is liable." But this liability cannot in any case be so extended as to make the corporation liable for the non-performance or insufficient performance of a discretionary duty.

⁸³ See Jones, Neg. of Mun. Corp., § 40.

⁸⁴ Bailey v. New York, 3 Hill (N. Y.), 531. These cases proceed upon the principle that "a city or town which is charged with a public duty in consideration of valuable franchises is liable to indemnify an individual who suffers any special injury from a neglect of the city; and that a city or town which derives any emolument from the exercise of powers conferred upon it is liable in like manner for the negligent or unskillful exercise of the powers by its agents or for the neglect of a duty which is consequent upon having exercised them; and in such cases the officers engaged in the execution of the powers are to be regarded as the agents of the city or town." Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434.

⁸⁵ In Smith v. Philadelphia, 81

Pa. St. 38, 22 Am. Rep. 731, it was held that the amount of water rent paid was the measure of damages which could be recovered for the failure of the city to supply the plaintiff with water. No damages can be recovered for being deprived of the water. Compare, Stock v. Boston, 149 Mass. 410.

⁸⁶ Wilkins v. Rutland, 61 Vt., 336. In Hand v. Brookline, 126 Mass. 324, Gray, C. J., said: "If the water escaping from the aqueduct by reason of its negligent and imperfect construction had injured buildings or property, there could be no doubt of the right of the owner to recover damages against the town. The fact that the injury occasioned was within the limits of a highway where the person injured has a lawful right to be, affords no grounds for exempting the town from liability." See Grimes v. Keene, 52 N. H. 335.

Thus, a city is not bound to protect the property of its citizens from fire, and it cannot be held in damages for a failure to supply the necessary water to extinguish a fire, or for defects of any kind or character in the hydrants or other machinery which it provides for the purpose of extinguishing fires.⁸⁷ The electrical bureau of a city from which it receives fees from grants of privileges to private persons is of such a private nature as to render the city liable for the negligence of its servants.⁸⁸

⁸⁷ *Mendel v. Wheeling*, 28 W. Va. 233; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405. ⁸⁸ *Bodge v. Philadelphia*, 167 Pa. St. 492.

CHAPTER XXII.

MUNICIPAL DUTIES RELATING TO GOVERNMENTAL AFFAIRS.

§ 330. General statement.

331. Common law duty to repair highways.

332. Conflicting rules—Chartered municipalities.

333. Liability of counties and towns.

334. Extent of duty to care for highways.

335. Lighting the streets.

§ 336. Necessary obstructions.

337. Illustrations.

338. Lack of funds as a defense.

339. Liability for acts of licensees.

340. Care of sidewalks.

341. Obstructions on sidewalk.

342. Ice and snow on highways.

343. Care of bridges.

344. Notice.

§ 330. General statement.—While public corporations are not liable for negligence in connection with the performance of solely governmental duties, and are liable for negligence in connection with solely municipal duties, more difficult questions are presented when we come to consider their liability for duties which are ministerial in their nature but which relate to governmental affairs. Illustrations of duties of this character are found in connection with highways, sewers, bridges and other public works. The decisions are very conflicting, and the defects or uncertainties of the common law have in many cases been cured by statutes.

§ 331. Common law duty to repair highways.—The control of highways rests primarily with the state, but it is almost universally imposed upon public corporations through which the highways run. The decisions upon the question of the implied liability of such corporations for injuries resulting from neglect to perform the duty of keeping the highways in reasonably safe condition are so conflicting that little more can be done than to classify them. It will be found that the liability or non-liability is made to depend upon the nature of the corporation or the nature of the duty to be performed, and the means within the control of the corporation for performing the duty. The student must in all cases, however, consult the statutes of the state.

§ 332. Conflicting rules—Chartered municipalities.—In the New England states it is almost universally held that no implied liability attaches to a county, town or even a chartered municipality for failing to keep the highways in proper condition. In the leading Massachusetts case,¹ the authorities are elaborately discussed by Chief Justice Gray and the statement made that such liability is not recognized by the English cases. This conclusion, however, has been criticised,² and there are strong reasons for believing that the common law, as declared by the English courts, was otherwise. What may be called the rule of the case of *Russell v. Men of Devon*, as construed by these Massachusetts cases, has been followed in a number of states.³ But the implied lia-

¹ *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. See the early cases of *Riddell v. Proprietors of Locks*, 7 Mass. 169; *Mower v. Leicester*, 9 Mass. 237.

² This doctrine rests upon the authority of *Russell v. Men of Devon*, 2 T. R. 667. The early English authorities are reviewed in *Jones on Neg. of Mun. Corp.*, §§ 15-19. In *Thomas v. Sorrell, Vaughan*, 330, decided in the latter half of the seventeenth century, we find the following statement by Chief Justice Vaughan: "And note, if a man have particular damage by a foundrous way, he is generally without remedy, though the nuisance is to be punished by the king. The reason is, because a foundrous way, a decayed bridge or the like, are commonly to be repaired by some township, vill, hamlet or a county, who are not corporate, and therefore no action lies against them for a particular damage, but their neglects are to be presented, and they punished by fine to the king. But if a particular person or body corporate be to repair a certain highway or portion of it, or a bridge, and a man is endamaged particularly by the foundrousness of the way or

decay of the bridge, he may have his action against the person or body corporate who ought to repair, for his damage, because he can bring his action against them; but where there is no person against whom to bring his action, it is as if a man be damaged by one that cannot be known."

³ *Fort Smith v. York*, 52 Ark. 84; *Winbigler v. Los Angeles*, 45 Cal. 36; *Chope v. Eureka*, 78 Cal. 588, 4 L. R. A. 327, two judges dissenting. A number of authorities are cited in note to this case. *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Dec. 677; *Aldrich v. Gorham*, 77 Me. 287; *Moore v. Abbot*, 32 Me. 46; *Detroit v. Blackeby*, 21 Mich. 84; *Eastman v. Meredith*, 36 N. H. 284; *Elliott v. Lisbon*, 57 N. H. 27; *Pray v. Jersey City*, 32 N. J. Law, 394; *Wild v. Paterson*, 47 N. J. Law, 406; *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35 (injury caused by defect in school-house); *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Wilkins v. Rutland*, 61 Vt. 336; *Welsh v. Rutland*, 56 Vt. 228; *Cairncross v. Pewaukee*, 78 Wis. 66, 10 L. R. A. 473; *Robinson v. Rohr*, 73 Wis. 436, 2 L. R. A. 366.

bility of chartered municipalities, although not generally of public *quasi*-corporations, for negligence in the care of highways, is recognized by a strong current of authority in the states outside of New England.⁴ This doctrine has been adopted by the supreme court of the United States,⁵ which will, however, follow the decisions of the highest court of the state from which an appeal is taken.⁶

§ 333. Liability of counties and towns.—By a very decided weight of authority, there is no liability on the part of counties and townships for the care of highways unless such liability is created by statute.⁷ In some states there is no liability even when

⁴ Dillon, *Mun. Corp.* (4th ed.), § 1017; Jones, *Neg. of Mun. Corp.*, § 57; *Smoot v. Wetumpka*, 24 Ala. 112; *Montgomery v. Wright*, 72 Ala. 411; *Denver v. Dunsmore*, 7 Colo. 328; *Denver v. Williams*, 12 Colo. 475; *Larson v. Grand Forks*, 3 Dak. 307; *Anderson v. Wilmington*, 8 Houston (Del.), 516, 19 Atl. Rep. 509; *Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358; *Brunswick v. Braxton*, 70 Ga. 193; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 325; *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. 827; *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253; *Protestant Episcopal Church v. Anamosa*, 76 Iowa, 538, 2 L. R. A. 606; *Chicago v. Keefe*, 114 Ill. 222; *Kansas City v. Birmingham*, 45 Kan. 212, 25 Pac. 569; *Topeka v. Tuttle*, 5 Kan. 186; *Greenwood v. Louisville*, 13 Ky. 226; *Cline v. Crescent City R. Co.*, 41 La. Ann. 1031, 6 So. Rep. 851; *Baltimore v. Marriott*, 9 Md. 160; *Kennedy v. Cumberland*, 65 Md. 514; *Welter v. St. Paul*, 40 Minn. 460, 12 Am. St. 752, and note; *Shartle v. Minneapolis*, 17 Minn. 308 (Gil. 284); *Whitfield v. Meridian*, 66 Miss. 570, 4 L. R. A. 834, 14 Am. St. 596; *Haniford v. Kansas City*, 103 Mo. 172; *Maus v.*

Springfield, 101 Mo. 618, 20 Am. St. 634; *Sullivan v. Helena*, 10 Mont. 134, 25 Pac. 94; *Ponca v. Crawford*, 18 Neb. 551, 28 Neb. 762, 8 Am. St. 144; *Lincoln v. Smith*, 29 Neb. 228. This case is elaborately annotated in 10 L. R. A. 735; *McNally v. Cohoes*, 127 N. Y. 350; *Ehrgott v. New York*, 98 N. Y. 264; *McDonough v. Virginia City*, 6 Nev. 431; *Bunch v. Edenton*, 90 N. C. 431; *Shelby v. Clagett*, 46 Ohio St. 549; *Cleveland v. King*, 132 U. S. 295; *Sheridan v. Salem*, 14 Oreg. 328; *Farquar v. Roseburg*, 18 Oreg. 271, 17 Am. St. 732, note; *Brookville v. Arthurs*, 130 Pa. St. 501; *Knoxville v. Bell*, 12 Lea (Tenn.), 157; *Galveston v. Posnainsky*, 62 Tex. 118; *Levy v. Salt Lake City*, 3 Utah, 63; *McCoull v. Manchester*, 85 Va. 579, 2 L. R. A. 691; *Morgan v. Morley*, 1 Wash. 464; *Phillips v. Ritchie County*, 31 W. Va. 477.

⁵ *District of Columbia v. Woodbury*, 136 U. S. 450; *Barnes v. District of Columbia*, 91 U. S. 540.

⁶ *Detroit v. Osborne*, 135 U. S. 492.

⁷ *Hill v. Boston*, 122 Mass. 344; *Templeton v. Linn County*, 22 Oreg. 313, 15 L. R. A. 730; *Bates v. Rutland*, 62 Vt. 178, 9 L. R. A.

the duty to repair rests upon such corporation, as this duty is purely governmental.⁸ The rule of non-liability of counties and towns is adopted in many states where the decisions impose the liability upon municipal corporations proper.⁹ The distinction between the liability of municipal corporations and public *quasi*-corporations in this respect is well established, although it rests upon very unsatisfactory reasons.¹⁰ It is not universal, however, as some states impose a liability upon counties¹¹ and even townships,¹² especially in connection with the care of bridges.¹³ Of course there is no corporate liability when the duty to care for highways is imposed upon certain officials and not upon the corporation. Under such circumstances the corporation is not liable for the negligence of the officers unless made so by statute.¹⁴

§ 334. Extent of duty to care for highways.—Where the law imposes the duty to care for streets upon municipal corporations, it is bound to exercise reasonable care to see that they are in safe condition,¹⁵ but it is not an insurer of their

363; *Perry v. John*, 79 Pa. St. 412; *Peters v. Fergus Falls*, 35 Minn. 549; *Dosdall v. Olmsted Co.*, 30 Minn. 96; *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Elliott, Roads and Streets*, p. 42. In *Dillon, Mun. Corp.*, II, § 997, it is said: "In the United States there is no common-law obligation resting upon *quasi*-corporations such as counties, townships and New England towns to repair highways, streets or bridges within their limits, and they are not obliged to do so unless by force of statute."

⁸ *Altnow v. Town of Libley*, 30 Minn. 186, 44 Am. Rep. 191; *Stilling v. Thorp*, 54 Wis. 528.

⁹ *Thompson, Neg.*, I, p. 615; *Dillon, Mun. Corp.*, I, § 1023; *Jones, Neg. Mun. Corp.*, ch. 8. Conflicting authorities are cited in a note to *Eastman v. Clackamas County*, 32 Fed. 24.

¹⁰ *Elliott, Roads and Streets*, p. 319, and cases cited.

¹¹ *Shadler v. Blair County*, 136 Pa. St. 488; *Anne Arundell County v. Duckett*, 20 Md. 468.

¹² *Dean v. New Milford Tp.*, 5 W. & S. (Pa.) 545.

¹³ *Howard County Commissioners v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Wilson v. Jefferson County*, 13 Iowa, 181. But see *Green v. Harrison County*, 61 Iowa, 311.

¹⁴ *Monk v. New Utrecht*, 104 N. Y. 552; *Reardon v. St. Louis County*, 36 Mo. 555; *Scales v. Chattahoochee County*, 41 Ga. 225.

¹⁵ *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57, note. When the city authorizes a railway company to occupy a street which is thereby rendered in an unsafe condition, a person who is injured may proceed against the city or the railway company. The primary liability is on the city. *Zanesville v. Fannan*, 53 Ohio St. 605, 53 Am. St. 664; *Eyler v. Com-*

safety.¹⁶ The street must be public,¹⁷ and under the control of the corporation.¹⁸ It must have been accepted by the corporation after being dedicated by the owner of the land.¹⁹ If the city has assumed the care of a street, it is responsible thereafter for its condition, although the street may not be technically under the care of the city. The entire width of the street must be kept in a safe condition.²⁰ This rule, however, does not apply to a country highway, where the duty extends only to the traveled part of the road.²¹ There may be instances, however, where the corporation would be liable for injuries resulting to one traveling outside of the limits of the highway; as, "where there is no visible boundary to the line of the street and a portion of the roadway traveled on is so near the actual line (although really outside thereof) as to induce the belief in any one exercising reasonable care that he is within such line."²²

missioners, 49 Md. 257, 33 Am. Rep. 249. A railway which has torn up a street must restore it to its former condition, and if it fails to do so it is liable for damages for injuries. Louisville, etc. R. Co. v. Pritchard, 131 Ind. 564, 11 Am. St. 395, and cases cited in note; State v. St. Paul, etc. R. Co., 35 Minn. 131, 59 Am. Rep. 313.

¹⁶ Hunt v. New York, 109 N. Y. 134; Burns v. Bradford, 137 Pa. St. 361, 11 L. R. A. 726. A municipal corporation is not required to keep its walks and streets in such condition as to render an accident impossible, but merely to use reasonable care and prudence in detecting and remedying any defect which it might fairly anticipate would be likely to cause an accident. Butler v. Oxford, 186 N. Y. 444.

¹⁷ Carpenter v. Cohoes, 81 N. Y. 21, 37 Am. Rep. 468; Veale v. Boston, 135 Mass. 187.

¹⁸ Taylor v. Woburn, 130 Mass. 494; Hart v. Red Cedar, 63 Wis. 634; Will v. Village of Mendon, 108

Mich., 251, 66 N. W. 58; City of Chadron v. Glover, 43 Neb. 732, 62 N. W. 62.

¹⁹ Ivory v. Deerpark, 116 N. Y. 476; Estelle v. Lake Crystal, 27 Minn. 243.

²⁰ Monongahela City v. Fischer, 111 Pa. St. 9. The corporation must keep the streets in the outskirts of the city clear for such a width as the public necessity and convenience require. Village of Rankin v. Smith, 63 Ill. App. 522.

²¹ Perkins v. Fayette, 68 Me. 152; Fitzgerald v. Berlin, 64 Wis. 203; Campbell v. Race, 7 Cush. 408.

²² Jewhurst v. Syracuse, 108 N. Y. 303. A city must use reasonable care to prevent pedestrians from falling into excavations on private property adjacent to the sidewalk. Wiggan v. St. Louis, 135 Mo. 558. But there is no liability for injuries suffered by one who goes outside of an unfenced highway when the whole of the highway is in safe condition. McHugh v. St. Paul, 67 Minn. 441, 70 N. W. 5.

That part of the road which is kept open to travel must be kept in a reasonably safe condition,²³ although in order to do so it may be necessary to protect the public from injury by obstructions or excavations on adjoining land.²⁴ It is for the jury to determine whether, under the circumstances of the particular case, the obstruction was of such a nature that the highway was not in a suitable state of repair, and whether the corporation was negligent in not removing the obstruction.²⁵

§ 335. Lighting the streets.—Where a city is required by a statute or by its charter to light its streets, it is, of course, liable for injuries caused by its neglect to do so; but where no such duty is imposed on it by the legislature, it is not liable for omitting to light the streets,²⁶ although the fact that a street is not lighted may be material upon the question of negligence where it was partially obstructed or out of repair.²⁷ It is the duty, however, of the corporation to place lights near obstructions or excavations temporarily placed in the streets.²⁸

§ 336. Necessary obstructions.—There are many obstructions which may be placed or allowed to be placed in a public street which do not constitute defects or nuisances. If they do not unnecessarily interfere with the primary purpose for which streets are dedicated, they do not render the way unsafe in the eye of the law. Thus hydrants,²⁹ hitching posts,³⁰ door-steps³¹ and stepping-stones³² are not in themselves objects which render

²³ *Aston v. Newton*, 134 Mass. 507; *Stafford v. Oskaloosa*, 57 Iowa, 748.

²⁴ *Rooney v. Randolph*, 128 Mass. 580.

²⁵ *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Seeley v. Litchfield*, 49 Conn. 134, 44 Am. Rep. 213; *Michigan City v. Boeckling*, 122 Ind. 39; *Goodfellow v. New York*, 100 N. Y. 15; *Foxworthy v. Hastings*, 25 Neb. 133; *Hill v. Fond du Lac*, 56 Wis. 242.

²⁶ *Dillon, Mun. Corp.*, II, § 1010; *Freeport v. Isbell*, 83 Ill. 440; *Gould v. Topeka*, 32 Kan. 485; *Cleveland v. King*, 132 U. S. 295; *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5.

²⁷ *Elliott, Roads and Streets*, p. 457; *Lyon v. Cambridge*, 136 Mass. 419.

²⁸ *McCoull v. Manchester*, 85 Va. 579; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269. In *Sinclair v. Baltimore*, 59 Md. 592, it was held that the city need not place lights upon building material which has been left in the street.

²⁹ *Ring v. Cohoes*, 77 N. Y. 83.

³⁰ *Macomber v. Taunton*, 100 Mass. 255.

³¹ *Cushing v. Boston*, 128 Mass. 330.

³² *Kingston v. Dubois*, 102 N. Y. 219.

a street unsafe. The public must adapt itself to the fact of their existence, and if they are properly located and cared for the city is not liable for injuries occasioned by them. The same rule applies to car tracks and merchandise and building material temporarily placed in a street.³³ They constitute obstructions, but they are necessary, and when properly guarded³⁴ may be allowed to remain in a street for a reasonable time³⁵ without rendering the municipality liable for injuries occasioned thereby.³⁶ But unnecessary obstructions must not be allowed to remain in the street, as the city must "keep all streets, sidewalks and crossings in a reasonably safe condition and free from all unnecessary and dangerous obstruction, so as not to endanger the persons of those lawfully using the same."³⁷ The size or location of the object is immaterial if it renders the street unsafe³⁸

§ 337. Illustrations.—Municipal corporations have been held liable for injuries occasioned by negligently leaving a road scraper in a street,³⁹ wires across a highway,⁴⁰ mud piled in a street and allowed to freeze,⁴¹ projecting nails in a plank street,⁴² a projecting water plug,⁴³ a wagon standing in the street under a license,⁴⁴ unguarded holes or excava-

³³ Callanan v. Gilman, 107 N. Y. 360.

³⁴ Bauer v. Rochester, 35 N. Y. St. Rep. 959; Olson v. Chippewa Falls, 71 Wis. 558; Wilson v. White, 71 Ga. 506; 51 Am. Rep. 269.

³⁵ Pettengill v. Yonkers, 116 N. Y. 558.

³⁶ Cleveland v. King, 132 U. S. 295; Nolan v. King, 97 N. Y. 565; Klatt v. Milwaukee, 53 Wis. 196. A corporation is not relieved from liability by the fact that the person who was allowed to place the obstruction in the street agreed to protect the public. Cleveland v. King, *supra*; Farquar v. Roseburg, 18 Oreg. 271, 17 Am. St. 272; Boucher v. New Haven, 40 Conn. 456.

³⁷ Glantz v. Bend, 106 Ind. 305; Village of Ponca v. Crawford, 23

Neb. 662, 8 Am. St. 144, note.

³⁸ McCool v. Grand Rapids, 58 Mich. 41.

³⁹ Whitney v. Town of Ticonderoga, 127 N. Y. 40, 27 N. E. 403.

⁴⁰ Hayes v. Hyde Park, 153 Mass. 514, 12 L. R. A. 249.

⁴¹ Champaign v. Jones, 132 Ill. 304.

⁴² Michigan City v. Boeckling, 122 Ind. 39.

⁴³ Scranton v. Catterson, 94 Pa. St. 202.

⁴⁴ Cohen v. New York, 113 N. Y. 532. In this case the court said: "We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that

tions,⁴⁵ no matter by whom made,⁴⁶ a hole caused by the breaking of a water pipe,⁴⁷ an open culvert,⁴⁸ slippery objects under certain circumstances,⁴⁹ excavations and embankments adjoining the street which render it unsafe,⁵⁰ a collision caused by the narrowing of a street by an embankment.⁵¹ Obstructions which have a natural tendency to frighten horses being driven along the highway are generally viewed as defects, and the corporation held liable for injuries resulting therefrom.⁵² As a general rule no distinction is made

when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license."

⁴⁵ *Barr v. Kansas City*, 105 Mo. 550.

⁴⁶ *Savannah v. Donnelly*, 71 Ga. 258.

⁴⁷ *Hopkins v. Ogden City*, 5 Utah, 390, 16 Pac. 596.

⁴⁸ *O'Gorman v. Morris*, 26 Minn. 267.

⁴⁹ *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381.

⁵⁰ *Barnes v. Chicopee*, 138 Mass. 67, 52 Am. Rep. 259. In *Puffer v. Orange*, 122 Mass. 389, 23 Am. Rep. 368, the court said: "A town is bound to erect barriers or railings where a dangerous place is in such close proximity to the highway as to make traveling on the highway unsafe. But it is not bound to do so to prevent travelers from straying from the highway, although there is a dangerous place at some distance from the highway which they may reach by so straying." *Hudson v. Marlborough*, 154 Mass. 218, 28 N. E. 147.

⁵¹ *Fopper v. Wheatland*, 59 Wis. 623; *Flagg v. Hudson*, 142 Mass. 280.

⁵² *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600 (statutory duty—see an elaborate note to this case); *Dimock v. Suffield*, 30 Conn. 129; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124; *Cairncross v. Pewaukee*, 78 Wis. 66, 10 L. R. A. 473; *Campbell v. Stillwater*, 32 Minn. 308; *Thompson, Neg.*, § 1011; *Shearman & Red. Neg.*, § 169. The city is liable if the object has a natural tendency to frighten horses of ordinary gentleness and training. *Piollet v. Simmers*, 106 Pa. St. 95, 51 Am. Rep. 496. For contrary decisions, see *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365, and *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 388 (boulders in street). A steam-engine, as a means of locomotion in a highway, is not necessarily a nuisance. Where the use of one frightens horses the right of action for injuries will depend upon the question of negligence. *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522. But see *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216. In *Omaha v. Richards*, 49 Neb. 244, the court said: "A case quite analogous in principle to the one at bar is *City of Chicago v. Hesing*, 83 Ill. 204. That was an action to recover damages for the death of a child

between cases where the obstruction or defect was due to the act of the corporation or the act of private individuals. The right of action against the city rests upon the duty of the city to keep the streets in a reasonably safe condition,⁵³ and this duty cannot be shifted upon the property owners.

§ 338. Lack of funds as a defense.—A public corporation is not liable for damages caused by its failure to repair a street where it has neither the means nor the corporate power to procure the means necessary for making such repairs;⁵⁴ but “want of funds to repair a street will not excuse a city for its neglect in regard to them unless it has exhausted all the means at its command to raise funds or to make the repairs and unless the accident could not have been prevented by guards or signs.”⁵⁵ If it has not the means of keeping the street in proper condition,

about four years old.” The third paragraph of the syllabus reads thus: “It is gross negligence on the part of the city to leave a ditch filled with water about five feet deep in a public and frequented street bordering on a sidewalk without any guards to prevent children from falling into the same, and if a child is drowned by falling into the same the city will be liable.” The same principle was held in *Village of Carterville v. Cook*, 129 Ill. 152; *Brennan v. City of St. Louis*, 92 Mo. 482; *City of Indianapolis v. Emmelman*, 108 Ind. 530; *Nichols v. City of St. Paul*, 44 Minn. 494; *Hawley v. City of Atlantic*, 92 Iowa, 172, 60 N. W. 519; *Reed v. City of Madison*, 83 Wis. 171; *Gibson v. Huntington*, 38 W. Va. 177. See, also, for a similar case, *Seben v. City of Chicago*, 165 Ill. 371. In *Kies v. Erie*, 169 Pa. St. 598, it appears that the plaintiff was injured by the large doors of a fire-engine house suddenly opening out, and the court

said: “If the operation of these doors with reasonable care would have provided against danger and accident to the passers-by, the city is liable. If the necessary and natural and probable operation of these doors was dangerous, even though accompanied by the use of ordinary care on the part of the employees, the city is liable for such results.”

⁵³ But see *Baltimore v. O'Donnell*, 53 Md. 110.

⁵⁴ *Hines v. Lockport*, 50 N. Y. 236; *Weed v. Ballston Spa*, 76 N. Y. 329; *Ivory v. Deerpark*, 116 N. Y. 476; *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. 596. The defense of want of means to make repairs must be pleaded. *Netzer v. Crookston*, 59 Minn. 244.

⁵⁵ *Jones, Neg. of Mun. Corp.*, § 75; *Dillon, Mun. Corp.*, II, § 1017; *Elliott, Roads and Streets*, p. 445; *Delger v. St. Paul*, 14 Fed. 567; *Birmingham v. Lewis*, 92 Ala. 352, 9 So. 243; *Lord v. Mobile*, 113 Ala. 360, 21 So. 366.

it should either close the street or protect the public by means of guards or other proper and necessary signs.⁵⁶

§ 339. Liability for acts of licensees.—The rule is that a municipal corporation is not liable for injuries resulting from the acts of its licensees unless the license is granted without authority⁵⁷ or the acts so licensed are admittedly dangerous.⁵⁸ The liability in such cases must be distinguished from the mere failure to prevent the doing of an act which is an exercise of legislative discretion.⁵⁹ The corporation may exercise its discretion on the question of forbidding certain conduct without being liable for damages which would have been avoided had the conduct been forbidden.⁶⁰ Thus, the corporation is not liable because it fails to prevent persons from coasting on streets, although such a use of the streets is manifestly dangerous to the public.⁶¹ But a city may be liable if, without authority, it authorizes a wagon to stand in the street⁶² or a steam motor to use the street.⁶³

⁵⁶ *Monk v. New Utrecht*, 104 N. Y. 552. Knowledge that there is no money in the treasury by one who is hurt by a defective sidewalk is not notice of the defects. *Village of Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. 144.

⁵⁷ *Cohen v. New York*, 113 N. Y. 532.

⁵⁸ As by authorizing a lunatic to sell gunpowder. *Cole v. Nashville*, 4 Sneed (Tenn.), 162. In *Wheeler v. Plymouth*, 116 Ind. 158, 9 Am. St. 837, 18 N. E. 532, the court said: "It is quite well settled that a municipal corporation is not liable for the acts of its licensees, unless it is shown that they were authorized to perform an act dangerous in itself." The cases cannot be reconciled, but the test seems to be, Did the city merely fail to prohibit the act by appropriate legislation or for the time being suspend its legislation, and thus, by failing to prohibit, consent (*Lincoln v. Boston*, 148 Mass. 578, 3 L. R. A. 357), or did it affirmatively authorize the act? If the

authority given is in general terms, it will be presumed that the licensee will exercise due care and the city will not be responsible for his negligence (*Little v. Madison*, 49 Wis. 605); but if the city licenses a dangerous act, or acts beyond its general authority in licensing an act which it has no power to license, it is liable for damages resulting therefrom.

⁵⁹ *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. 490.

⁶⁰ *Little v. Madison*, 49 Wis. 605.

⁶¹ *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105 (under permission of an ordinance); *Lafayette v. Timberlake*, 88 Ind. 330; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 782; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Steele v. Boston*, 128 Mass. 583; *Wilmington v. Van Degrift*, 1 Marvel (Del.) 5, 29 Atl. 1047, 25 L. R. A. 538.

⁶² *Cohen v. New York*, 113 N. Y. 532.

⁶³ *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216.

§ 340. Care of sidewalks.—A municipal corporation is liable for injuries resulting from the improper condition of a sidewalk which is under its care,⁶⁴ although it was constructed by a private corporation or individual.⁶⁵ It is its duty to keep the sidewalks in a reasonably safe condition both day and night for the uses for which they are designed.⁶⁶ This duty exists in the case of all sidewalks under the control of the city, although what would amount to negligence in one locality might be proper care in another.⁶⁷ The liability is the same in respect to walks built by private persons or situated on private property, if they are under the care and control of the corporation.⁶⁸ This duty cannot be imposed upon the lot owner in such a manner as to relieve the corporation from its responsibility.⁶⁹ By the weight of authority the imposition by ordinance of the duty to care for the sidewalk upon the owner of adjoining property does not render the lot owner liable to individuals or relieve the municipality.⁷⁰

⁶⁴ *Roe v. Kansas City*, 100 Mo. 190. As to liability for defective construction or the adoption of a dangerous plan, see *infra*, § 348.

⁶⁵ *Hutchings v. Sullivan*, 90 Me. 131, 37 Atl. 883; *Salisbury v. Ithaca*, 94 N. Y. 27.

⁶⁶ *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. Rep. 964.

⁶⁷ *South Omaha v. Powell*, 50 Neb. 798, 70 N. W. 391; *Waggener v. Point Pleasant*, 42 W. Va. 798; *City of Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Fulliam v. Muscatine*, 70 Iowa, 436, 30 N. W. 861.

⁶⁸ *Graham v. Albert Lea*, 48 Minn. 201, 50 N. W. 1108; *Foxworthy v. Hastings*, 31 Neb. 825, 48 N. W. 901; *Mansfield v. Moore*, 124 Ill. 133; *Jewhurst v. Syracuse*, 108 N. Y. 303.

⁶⁹ *Betz v. Limingl*, 46 La. Ann. 1113, 46 Am. St. 344; *Rochester v. Campbell*, 123 N. Y. 405; *Brookville v. Arthurs*, 130 Pa. St. 501; *Keokuk v. Independent District*, 53 Iowa, 352, 36 Am. Rep. 226; *Noonan v. Stillwater*, 33 Minn. 198;

Davenport v. Ruckman, 37 N. Y. 568. The mere fact that the charter made it the duty of the city to repair the sidewalks at the expense of the lot owner does not make the owner primarily liable for injuries caused by negligence. *Fife v. Oshkosh*, 89 Wis. 540; *Sommers v. Marshfield*, 90 Wis. 59. No obligation to repair streets or sidewalks rests upon the owners of abutting property at common law. *Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. 760, and note.

⁷⁰ *Lord v. Mobile*, 113 Ala. 360, 21 So. Rep. 366; *Flynn v. Canton Co.*, 40 Md. 321, 17 Am. Rep. 603; *Zanesville v. Fannan*, 53 Ohio St. 605, 53 Am. St. 664 (liability of city and railway company); *Sioux City v. Weare*, 59 Iowa, 95; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Dillon, Mun. Corp.*, I, §§ 1035, 1037. The crosswalks are a part of the sidewalk. *Goodfellow v. New York*, 100 N. Y. 15. See under statute, *Hoyt v. Danbury*, 69 Conn. 341.

The owner is, of course, liable for his own acts of negligence, as where he places an obstruction in the street;⁷¹ but the mere fact that he is so liable, or that he is liable over to the corporation,⁷² does not relieve the corporation from its liability to persons injured by reason of the street being in an unsafe condition.⁷³ Some courts hold that a statute which imposes the duty of keeping the sidewalk in repair upon the owners of adjoining property is unconstitutional.⁷⁴ Where a charter made it the duty of the lot owner to construct the sidewalk in front of his property and to keep the same in repair, and provided that if he failed to do so the city might do the work and charge the expense against the property, and that when an injury resulted from any defect in a sidewalk which was due to the wrong, default or negligence of any person other than the city such person should be primarily liable for the damages, it was held that the owner was not liable for a mere failure to keep the sidewalk in repair.⁷⁵ Reasonable care requires that the corporation shall make such inspection of the sidewalks from time to time as is reasonably necessary to guard against the results of the natural decay of the material of which they are constructed.⁷⁶ The duty to keep the sidewalks in a reasonably safe condition is at common law owing to every person who uses the streets for the ordinary purposes for which they are designed.⁷⁷

⁷¹ Rochester v. Campbell, 123 N. Y. 405, 10 L. R. A. 393; Calder v. Smalley, 66 Iowa, 219.

⁷² City of Pawtucket v. Bray, 20 R. I. 17, 37 Atl. 1.

⁷³ Noonan v. Stillwater, 33 Minn. 198; Kellogg v. Janesville, 34 Minn. 132. Joint action may be maintained against city or lot owner, where there is a neglect to perform a common duty. Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Stebbins v. Keene Township, 55 Mich. 552; McConnell v. Osage City, 80 Iowa, 293.

⁷⁴ Noonan v. Stillwater, *supra*.

⁷⁵ Selleck v. Tallman, 93 Wis. 246; Toutloff v. Green Bay, 91 Wis. 490.

⁷⁶ Kellogg v. Janesville, 34 Minn.

132; Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; McConnell v. Osage City, 80 Iowa, 293; Stebbins v. Keene Township, 55 Mich. 552.

⁷⁷ Duffy v. Dubuque, 63 Iowa, 171; Maguire v. Spence, 91 N. Y. 302. When the liability is the creature of statute it extends only to travelers; but the word is given a liberal construction, and it is held to include every one who has occasion to pass over the highway for any purpose of business, convenience or pleasure. It must be kept "safe and convenient for all persons having occasion to pass over it while engaged in any of the pursuits or duties of life." Blodgett v. Boston, 8 Allen, 237; Reed v. Madison, 83 Wis. 171, 17 L. R.

§ 341. Obstructions on sidewalks.—A corporation must exercise reasonable care to protect the public from being injured by obstructions which are necessarily and properly placed on sidewalks and in the streets. The owner of land abutting upon a public street is permitted to encroach on the primary right of the public to a limited extent and for a temporary purpose, owing to the necessities of the case. Two facts must, however, exist to render the encroachment lawful; the obstruction must be reasonably necessary for the transaction of business and it must not unnecessarily interfere with the rights of the public.⁷⁸ The corporation must keep the streets as safe as practicable under such circumstances.⁷⁹ The corporation is not an insurer against all defects in its sidewalks.⁸⁰ Thus, stepping-stones for persons alighting from carriages,⁸¹ or slight unevenness or depression in the sidewalks,⁸² are not defects; but loose planks⁸³ and large holes⁸⁴ are such defects as will render the city liable for damages occasioned thereby. The city must provide reasonable guards and railings to prevent people from being injured by cellar-ways and area-ways entered from the street.⁸⁵ It must also protect them from dangers arising from structures overhead, such as awnings,⁸⁶ poles,⁸⁷ sign-boards,⁸⁸ and the like.

§ 342. Ice and snow on highways.—The liability for damages resulting from the presence of ice and snow in a public

A. 733. The question is discussed in *Duffy v. Dubuque*, 63 Iowa, 171, and in *Langlois v. Cohoes*, 58 Hun (N. Y.), 226.

⁷⁸ *Flynn v. Taylor*, 127 N. Y. 596; *Callanan v. Gilman*, 107 N. Y. 360. See *District of Columbia v. Woodbury*, 136 U. S. 450.

⁷⁹ *Nolan v. King*, 97 N. Y. 565.

⁸⁰ *Burns v. Bradford City*, 137 Pa. St. 361, 11 L. R. A. 726.

⁸¹ *Dubois v. Kingston*, 102 N. Y. 219.

⁸² *Witham v. Portland*, 72 Me. 539; *Childrey v. Huntington*, 34 W. Va. 459, 11 L. R. A. 313.

⁸³ *Moon v. Ionia*, 81 Mich. 535, 46 N. W. Rep. 25; *Armstrong v. Ackley*, 71 Iowa, 76.

⁸⁴ *Tice v. Bay City*, 84 Mich. 461, 47 N. W. 1062.

⁸⁵ *Maguire v. Spence*, 91 N. Y. 303; *Day v. Mt. Pleasant*, 70 Iowa, 193. But see *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677; *Elliott, Roads and Streets*, p. 453.

⁸⁶ *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564; *Bieling v. Brooklyn*, 120 N. Y. 98.

⁸⁷ *Norristown v. Moyer*, 67 Pa. St. 355.

⁸⁸ *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165; *Kutz v. Troy*, 104 N. Y. 344. As to the distinction between the liability in case of objects attached to and forming a part of the sidewalk and cases of overhanging objects, see *West v. Lynn*, 110 Mass. 514.

street is governed very much by locality. It is well settled, however, that in the absence of any structural defect mere slipperiness is not such a defect in a street as will render the municipality liable.⁸⁹ In some parts of the country it is held that the corporation must keep its sidewalks free from ice and snow, while in other localities, where the climate is such that this would be imposing an undue burden upon the municipality, it is held that no liability exists unless the ice or snow is allowed to accumulate in ridges or inequalities so as to form an obstruction in the street.⁹⁰ The duty is not affected by the fact that the ice is in part the result of artificial causes, as water escaping from a hose used by firemen.⁹¹ The liability has been held to exist where ice is formed on a sloping sidewalk⁹² or where it is caused by an accumulation of water due to a structural defect in the walk.⁹³ The owner of the adjoining property may be required to remove snow and ice from the sidewalk under a penalty,⁹⁴ but is not liable to individuals for injuries received by reason of his neg-

⁸⁹ *Chicago v. McGiven*, 78 Ill. 347; *Harrington v. Buffalo*, 121 N. Y. 147; *Bell v. York*, 31 Neb. 842, 48 N. W. 878; *Broburg v. Des Moines*, 63 Iowa, 523, 19 N. W. 340, 50 Am. Rep. 756; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614; *Rolf v. Greenville*, 102 Mich. 544.

⁹⁰ *Henkes v. Minneapolis*, 42 Minn. 530; *Stanke v. St. Paul*, 71 Minn. 51, 73 N. W. 629; *Cook v. Milwaukee*, 27 Wis. 191; *Kinney v. Troy*, 108 N. Y. 567; *Hausmann v. Madison*, 85 Wis. 187, 21 L. R. A. 263, annotated; *Huston v. Council Bluffs*, 101 Iowa, 33, 69 N. W. 1130, 36 L. R. A. 211; *Paulson v. Pelican*, 79 Wis. 445, 48 N. W. 715, and cases cited in preceding note. An accumulation of snow or ice on a sidewalk, allowed to remain after actual notice of the danger, will render the city liable for damages caused thereby. *Virginia v. Plummer*, 65 Ill. App. 419. Piling snow

on both sides of a railway track is negligence. *Ellis v. Lewiston*, 89 Me. 60. But see *Hutchinson v. Ypsilanti*, 103 Mich. 12, 61 N. W. 279. Liable for injuries caused by snow on sidewalk. *Fife v. Oshkosh*, 89 Wis. 540.

⁹¹ *Henkes v. Minneapolis*, 42 Minn. 530.

⁹² *Pinkham v. Topsfield*, 104 Mass. 78. See *Nichols v. St. Paul*, 44 Minn. 494 (sloping street).

⁹³ *Gillrie v. Lockport*, 122 N. Y. 403.

⁹⁴ *Carthage v. Frederick*, 122 N. Y. 269, 19 Am. St. 490, 10 L. R. A. 178; *Paxson v. Sweet*, 13 N. J. L. 196. But see *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. In *City of Port Huron v. Jenkinson*, 77 Mich. 414, 18 Am. St. Rep. 409, an ordinance which made it a crime for the owner of a lot to neglect to build a sidewalk in front of the lot, without reference to his ability to do so, was held invalid.

lect to comply with the requirements of such an ordinance.⁹⁵ The fact that a country road was impassable for a period of three months because of snow will not render the town liable for injuries received by a person trying to pass over the road.⁹⁶ There is no liability for a defect in a road made by travelers around a snowdrift.⁹⁷ A person who attempts to pass over a sidewalk which is dangerous by reason of ice, when he might avoid the same by passing around it, may be found to be guilty of contributory negligence.⁹⁸

§ 343. Care of bridges.—Bridges are ordinarily a part of the highway,¹ and it is for the corporation to decide whether or not they shall be built.² Where, however, a public corporation is required by a mandatory statute to construct a bridge, the duty may be compelled by *mandamus*.³ The corporation must exercise reasonable care during the construction of the bridge for the safety of travelers by placing proper guards and railings in the streets and around the approaches.⁴ The location of a bridge is a governmental act, but a corporation has been held liable for locating a bridge so as to injure adjoining property, on the theory that the government has no right to undertake the work in a negligent manner.⁵ During the process of construc-

⁹⁵ *Rochester v. Campbell*, 123 N. Y. 405; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502, and the elaborate decision in *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603. As to civil liability created by violation of an ordinance, see *Hartford v. Talcott*, 48 Conn. 525.

⁹⁶ *Burr v. Plymouth*, 48 Conn. 460.

⁹⁷ *Bogle v. Waupun*, 75 Wis. 1.

⁹⁸ *Erie v. Magill*, 101 Pa. St. 616, 47 Am. Rep. 739, annotated; *Quincy v. Barker*, 81 Ill. 300; *Belton v. Boston*, 54 N. Y. 245; *Shaeffer v. Sandusky*, 33 Ohio St. 246.

¹ *Goshen v. Myers*, 119 Ind. 196. "In this country the power of municipal corporations to build them and their authority over them are wholly statutory, and their duties in respect to them are either pre-

scribed by statute or spring from their powers. There is no common-law responsibility on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets and built by the municipal authorities under powers given to them by the legislature, they are liable for defects therein on the same principles and to the same extent as for defective streets." *Dillon, Mun. Corp.*, II, § 728.

² *Quinton v. Burton*, 61 Iowa, 471; *Orth v. Milwaukee*, 59 Wis. 336.

³ *State v. Northumberland*, 46 N. H. 156.

⁴ *Mullen v. Rutland*, 55 Vt. 77; *The Modock*, 26 Fed. 718.

⁵ *Hartford County v. Wise*, 75 Md. 38.

tion the corporation is under the same obligation to exercise reasonable care as an individual under the same circumstances.⁶ All public works must be so constructed as to withstand the ordinary storms of the locality,⁷ and as to afford a reasonably safe passage-way for the public, using it in the ordinary manner.⁸ But provision need not be made for supporting extraordinary weights.⁹ It must be so protected by proper guards and railings as to avoid injury to persons using the bridge in the exercise of ordinary care;¹⁰ that is, the corporation is under obligation to construct and maintain a reasonably safe structure.¹¹

§ 344. Notice.—Before a municipal corporation can be held liable for an injury resulting from a defective street which was not caused by its act or with its permission,¹² it must appear that it had actual or constructive¹³ notice of such defect in time to have repaired it or protected passers-by from injury.¹⁴ But

⁶ *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Doherty v. Braintree*, 148 Mass. 495.

⁷ *Allen v. Chippewa Falls*, 52 Wis. 430, 38 Am. Rep. 748; *Chicago, etc. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 618, note.

⁸ *Wabash v. Pearson*, 120 Ind. 426; *Wilson v. Granby*, 47 Conn. 59.

⁹ *Monongahela Bridge Co. v. Pittsburgh*, 114 Pa. St. 478; *Moore v. Kenockee Tp.*, 57 Mich. 332.

¹⁰ *Corballis v. Newberry Tp.*, 132 Pa. St. 9. Where the liability is to travelers, imposed by statute, the side-rails need not be sufficient to sustain the weight of one who leans upon them; they are supposed to be for the purpose of warning only. See *Stickney v. Salem*, 3 Allen 374. *Contra*, *Langlois v. Cohoes*, 58 Hun 226.

¹¹ *Jordan v. Hannibal*, 87 Mo. 673; *Ferguson v. Davis County*, 57 Iowa, 601.

¹² If the defective condition of the street is due to the negligence

of the corporation, notice is not essential. A city must take notice of the tendency of wood to decay. *Furnell v. St. Paul*, 20 Minn. 117 (Gil. 101); *Springfield v. Le Claire*, 49 Ill. 476; *Barton v. Syracuse*, 36 N. Y. 54.

¹³ The fact that a defect in a sidewalk on a prominent thoroughfare has existed for several months is constructive notice of its condition. *Moore v. Minneapolis*, 19 Minn. 300 (Gil. 259). Evidence that the sidewalk in or near the place of the accident was in generally bad condition is competent on the issue of notice. *Gude v. Mankato*, 30 Minn. 256; *Sterling v. Merrill*, 124 Ill. 522; *Cook v. Anamosa*, 66 Iowa, 427.

¹⁴ *Moore v. Minneapolis*, 19 Minn. 300 (Gil. 258); *Burleson v. Reading*, 117 Mich. 115, 68 N. W. 294; *L'Herault v. Minneapolis*, 60 Minn. 261, 72 N. W. 73; *Jones v. Clinton*, 100 Iowa, 333, 69 N. W. 418; *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475.

the corporation is chargeable with such knowledge of a condition in its streets as it is its duty to possess,¹⁵ and it is sufficient evidence of notice to establish the existence of facts from which notice will be inferred or circumstances from which the defect might have been known.¹⁶

¹⁵ Carstesen v. Town of Stratford, 67 Conn. 428. Gillvie v. Lockport, 122 N. Y. 403; Lorence v. Ellensburg, 13 Wash.

¹⁶ Lincoln v. Smith, 28 Neb. 762; 341, 52 Am. St. 42.

CHAPTER XXIII.

THE CONSTRUCTION AND CARE OF PUBLIC WORKS.

§ 345. Care of public property.

346. Surface waters.

347. Drainage and sewers.

348. The plan of a public work.

§ 349. Direct injury to property.

350. The construction and care of
sewers.

351. Consequential damages.

§ 345. Care of public property.—The rule of non-liability of a municipal corporation for negligence in the care of public buildings is thus stated by Mr. Justice Morton:¹ “A city or town is not liable to a private citizen for any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation. But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be.” This rule prevails in the New England states generally,² and elsewhere it exempts counties from liability for injuries caused by neglect to keep the public buildings in repair.³ In respect to cities, and other municipal corporations proper, as to liability in the absence of statute, the authorities are not uniform. Thus, a city has been held liable for injuries caused by the neg-

¹ Worden v. New Bedford, 131 Mass. 23.

² See Eastman v. Meredith, 36 N. H. 284; Wixon v. Newport, 13 R. I. 454; Hill v. Boston, 122 Mass. 344. Bigelow v. Randolph, 14 Gray, 541; Oliver v. Worcester, 102 Mass. 489,

³ Am. Rep. 485; Kelley v. Boston, 180 Mass. 233, 62 N. E. 259.

⁴ Dosdall v. Olmsted County, 30 Minn. 96, 44 Am. Rep. 185; Kincald v. Hardin County, 53 Iowa, 430, 36 Am. Rep. 236; Downing v. Mason County, 87 Ky. 208; Shepard v. Pulaski County, 13 Ky. Law, 672, 18 S. W. 15.

ligent condition of a courthouse,⁴ defective plumbing in a school building,⁵ an open cellar of a police station,⁶ a well maintained for public use,⁷ a fire engine,⁸ a public dumping yard,⁹ and of trees belonging to the city.¹⁰ But there is no liability for damages caused by the bursting of fire-hose caused by the negligence of the firemen,¹¹ the unsafe condition of a hydrant which resulted in injury to property of a citizen,¹² or the unsafe handling of a dumping truck while engaged in collecting the refuse of the city.¹³

§ 346. Surface waters.—By the common law any person may erect barriers to prevent surface water from coming upon his land, although it is thereby made to flow upon the land of another to his damage. This doctrine has been adopted in a number of states,¹⁴ while others adhere to what is known as the civil-law rule, which holds the lower estate chargeable with a servitude for

⁴ *Galvin v. New York*, 112 N. Y. 223, 19 N. E. 675.

⁵ *Briegel v. Philadelphia*, 135 Pa. St. 451, 30 Am. & Eng. C. C. 501, note; *Wixon v. Newport*, 13 R. I. 454.

⁶ *Carrington v. St. Louis*, 89 Mo. 208.

⁷ *Danaher v. Brooklyn*, 119 N. Y. 241. But the city is not an insurer of the quality of the water, and in order to authorize a recovery on that ground it is necessary to show wilful misconduct or culpable neglect.

⁸ *Lafayette v. Allen*, 81 Ind. 166. In this case the city was held liable to an engineer who was put at work on a defective engine. *Contra*, see *Wild v. Paterson*, 47 N. J. L. 406. See generally as to liability to employes, *Rhobidas v. Concord*, 70 N. H. 90, 47 Atl. 82.

⁹ *Fort Worth v. Crawford*, 74 Tex. 404.

¹⁰ *Jones v. New Haven*, 34 Conn. 1.

¹¹ *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

¹² *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762. *Contra*, *Jenny v. Brooklyn*, 120 N. Y. 164.

¹³ *Condict v. Jersey City*, 46 N. J. L. 157. See *Haley v. Boston*, 191 Mass. 291.

¹⁴ *Gannon v. Hargadon*, 10 Allen, 106, Bigelow, C. J. See, also, *Chadeayne v. Robinson*, 55 Conn. 345; *Murphy v. Kelley*, 68 Me. 521; *Edwards v. Charlotte R. R. Co.*, 39 S. C. 472, 22 L. R. A. 246; *Hanlin v. Chicago, etc. Co.*, 61 Wis. 515; *Jones v. Hannoran*, 55 Mo. 462; *Mo. Pac. R. Co. v. Keys*, 55 Kan. 205, 49 Am. St. 249, and note. The common law regards surface water as the common enemy which each proprietor may turn from his own land. The description was first used in *Rex v. Com'rs of Sewers*, 8 Barn. & Cress. 355. See an article in 23 Am. Law Rev. 372. See for common-law rule, *Mayor v. Sikes*, 94 Ga. 30, 47 Am. St. 132. The cases governing surface water are collected in an exhaustive note to *Gray v. McWilliams*, 98 Cal. 157, in 21 L. R. A. 593.

the benefit of the upper estate, to permit the surface water to flow over it *as it has been accustomed to do*.¹⁵ Where the common law rule prevails, cities and towns, as the owners of lands for highways and other public purposes, have the same right to obstruct and repel the flow of surface water as other proprietors.¹⁶ A corporation has less power over natural water-courses than over ordinary surface waters. To be a water-course "there must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides and banks, and usually discharge itself in some other stream or body of water."¹⁷ A natural water-course cannot be obstructed and the waters turned back upon the land of another proprietor.¹⁸ Every proprietor of land on a water-course is entitled to the employment and use of the stream substantially in its natural flow, subject only to such interruptions as are necessary and unavoidable in its reasonable and proper use by other proprietors.¹⁹ A corporation must so construct its public works as not to interfere with or obstruct the waters of a natural stream, and in the absence of a statute expressly authorizing such obstruction it is liable for real and substantial damages occasioned to individuals by its torts.²⁰ It is also established by the weight of authority that a municipal corporation is liable for damages if it collects surface water and causes it to be discharged with increased volume and force upon the property of an individual where it would not have gone by natural causes.²¹

¹⁵ Domat, Civil Law (Cush. ed.), § 1583; Lambert v. Alcorn, 144 Ill. 313, 21 L. R. A. 611; Gray v. McWilliams, 98 Cal. 157, 21 L. R. A. 593; Farris v. Dudley, 78 Ala. 124.

¹⁶ Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Inman v. Tripp, 11 R. I. 520; Wakefield v. Newell, 12 R. I. 75; Murray v. Allen, 20 R. I. 263, 38 Atl. 497.

¹⁷ Dixon, C. J., in Hoyt v. Hudson, 27 Wis. 656, 661, 9 Am. Rep. 473.

¹⁸ Emery v. Lowell, 104 Mass. 13.

¹⁹ See Warren v. Westbrook Mfg. Co., 86 Me. 32, 26 L. R. A. 284.

²⁰ Perry v. Worcester, 6 Gray, 544, 66 Am. Dec. 431, and note; Gilman v. Laconia, 55 N. H. 130, 20 Am. Rep. 175.

²¹ Kauffman v. Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437; Beach v. Gaylord, 43 Minn. 466; Conner v. Woodfill, 126 Ind. 85; Rathke v. Gardner, 134 Mass. 14; Rychlicki v. St. Louis, 98 Mo. 497; Kobs v. Minneapolis, 22 Minn. 159; Pyre v. Mankato, 36 Minn. 373, 1 Am. St. 671, note. In Davis v. Crawfordsville, 119 Ind. 1, 12 Am. St. 361, it was held that a city is liable in damages for collecting water in ar-

§ 347. Drainage and sewers.—A municipal corporation is not liable for damages resulting from a failure to exercise its discretionary or governmental power to improve its streets by constructing sewers or drains for the purpose of carrying off surface water and sewage.²² In determining the time when such public improvements shall be made, and the claims of various localities, it acts in a governmental capacity, and is not liable to any one for its action or non-action.²³ The authorities are not entirely in accord, but the prevailing rule seems to be that a city is not liable for damages occasioned by changing the flow of surface water when it results from a proper exercise of a legal power to grade the streets, or in constructing other public improvements.²⁴

§ 348. The plan of a public work.—It has often been said that a city is not liable for injuries caused by a defect or want of efficiency in the plan adopted for a sewer or other public improvement;²⁵ but this general statement is not concurred in by all courts, for some hold that the corporation may be held responsible if a lack of due care be shown in deciding on the plan. In deciding whether a system shall be adopted and in what part or parts of a city it shall be constructed, the corporation acts

tificial channels and casting it in a body upon the property of others, but is not liable for consequential damages caused by grading and improving its streets, unless the work was done negligently.

²² *Cochrane v. Malden*, 152 Mass. 365; *Noble v. St. Albans*, 56 Vt. 522; *Springfield v. Spence*, 39 Ohio St. 665; *Weis v. Madison*, 75 Ind. 241.

²³ *Mills v. Brooklyn*, 32 N. Y. 489; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Henderson v. Minneapolis*, 32 Minn. 319. It is not the duty of a city to construct sewers in order to relieve the property of individuals from surface water. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

²⁴ *Burns v. Cohoes*, 67 N. Y. 204; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Davis v. Crawfordsville*, 119 Ind. 1; *O'Brien v. St. Paul*, 25 Minn. 331. See 1 Dillon, *Mun. Corp.* (4th ed.), § 1042, and cases cited.

²⁵ The leading case is *Mills v. Brooklyn*, 32 N. Y. 489. The authorities are collected in an extensive note to *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431, 435. The author of the note says that the weight of authority (1886) is in favor of the view that the city acts judicially in adopting the plan of drainage. It will be observed that in *Mills v. Brooklyn*, 32 N. Y. 495, the court said that the plaintiff's condition was no worse than it would have been had no sewer been built.

free from liability to individuals for consequential damages. But according to these authorities, it must exercise reasonable care and skill in adopting the plan, as well as in the work of mechanical construction.²⁶ This requires that it shall use care in selecting advisers and engineers²⁷ and in adopting a system reasonably adequate for the work which, in the light of the history of the locality, will be required of it.²⁸ That is, there may be such a lack of care and skill in devising the plan as to amount to actionable negligence. But if proper care is used in adopting the plan there is no liability for damages resulting to individuals from the mere fact that the plan proves defective or insufficient. If, however, after the system is constructed, it proves injurious to property and with knowledge of that fact the corporation continues to maintain it, and individuals

²⁶ *North Vernon v. Voegler*, 103 Ind. 314; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Indianapolis v. Huffer*, 30 Ind. 235; *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126; *Van Pelt v. Davenport*, 42 Iowa, 308. There is no further responsibility for defects causing merely consequential injuries when reasonable care has been exercised to employ a competent engineer to devise the plan. *Diamond Match Co. v. New Haven*, 55 Conn. 510. The rule that a city is not liable for injuries occasioned by the plan adopted should not be so extended as to relieve "the city from liability when the plan devised and put in operation leaves the city's streets in a dangerous condition for public use." *Tiedeman, Pub. Corp.*, § 350, quoted with approval in *Chicago v. Seben*, 165 Ill. 371. See, especially, *Gould v. Topeka*, 32 Kan. 485. In *Omaha v. Richards*, 49 Neb. 244, the court said: "It was the duty of the city to have constructed the sewer and street in question in such a manner

as to provide a proper and adequate outlet for the water that might have been reasonably expected to come down this ravine. In failing to do so, the city authorities were guilty of negligence." The city was therefore held liable for injuries caused to a person using the street, by a pond of water therein. But these decisions rest upon the duty to repair streets.

²⁷ *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Diamond Match Co. v. New Haven*, 55 Conn. 510.

²⁸ *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. 547; *Allen v. Chippewa Falls*, 52 Wis. 430, 38 Am. Rep. 748. In *Spangler v. San Francisco*, 84 Cal. 12, the court said: "It is the duty of the city, when it does provide waterways, to provide such as are sufficient to carry off the water that may reasonably be expected to accumulate." Citing *Damour v. Lyon City*, 44 Iowa, 276; *Powers v. Council Bluffs*, 50 Iowa, 197; *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

are thereby damaged, it is liable,²⁹ as a city has no immunity from legal responsibility for maintaining an unauthorized nuisance.

§ 349. Direct injury to property.—It has already been stated that a municipality has no right, in the exercise of its power over its streets, to collect water and sewage and deposit them in a defined channel or accumulation upon the private property of an individual.³⁰ Such an act is a *direct invasion of a property right*, and the corporation is liable for the resulting damages, regardless of the fact that the sewer was constructed in accordance with the plan adopted.³¹ “To determine when and upon what plan a public improvement shall be made is,” says Chief Justice Gil-

²⁹ *Netzer v. Crookston*, 59 Minn. 244; *Tate v. St. Paul*, 56 Minn. 527; *Selfert v. Brooklyn*, 101 N. Y. 136; *Child v. Boston*, 4 Allen, 41. In *Netzer v. Crookston*, *supra*, the court said, with reference to *Tate v. St. Paul*: “The principle on which that case was really decided is that, even though the defect in the sewer is of legislative origin, yet where it is clearly demonstrated by experience, after sufficient trial, that the sewer is, under ordinary conditions, insufficient for its purpose, the city is liable for maintaining it; that while it is not liable for the original error, which was legislative, it is liable for persisting in that error after sufficient trial and experience, which is ministerial.” A city cannot justify itself in maintaining a private nuisance. *Miles v. Worcester*, 154 Mass. 511; *Harper v. Milwaukee*, 30 Wis. 365; *Noonan v. Albany*, 79 N. Y. 470.

³⁰ *Selfert v. Brooklyn*, 101 N. Y. 136; *Lynch v. New York*, 76 N. Y. 60; *Hitchins v. Frostburg*, 68 Md. 100; *Jacksonville v. Lambert*, 62 Ill. 519; *Gilluly v. Madison*, 63 Wis. 518. A city may be enjoined from discharging water on private lands. *Field v. West Orange*, 36 N.

J. Eq. 118. This rule does not change the liability of the corporation for merely changing or increasing the flow of surface water, as an adjoining owner might. *Heth v. Fond du Lac*, 63 Wis. 228. There is no liability for damages caused by water percolating from gullies into adjacent cellars. *Kennison v. Beverly*, 146 Mass. 467.

³¹ *Tate v. St. Paul*, 56 Minn. 527; *Selfert v. Brooklyn*, 101 N. Y. 136; *Huffmire v. Brooklyn*, 162 N. Y. 584; *Ashley v. Port Huron*, 35 Mich. 296; *Weis v. Madison*, 75 Ind. 241; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Boston Belting Co. v. Boston*, 149 Mass. 44; *Burford v. Grand Rapids*, 53 Mich. 98; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Rychlicki v. St. Louis*, 98 Mo. 497, 4 L. R. A. 594, note; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, with note on liability for the pollution of waters. In *Tate v. St. Paul*, 56 Minn. 527 at 530, the court said: “Judge Dillon, in his work on *Municipal Corporations* (4th ed.), §§ 1047 to 1051, approves the rule laid down in more recent decisions by some of our ablest courts, that if a sewer, whatever its plan, is so constructed as to cause a pos-

fillan,³² "unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is in its nature legislative; and although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground of action; as if, in grading streets to the authorized grades, the plan of the grading is inadequate to drain a lot of its surface water, or even if it makes it more difficult and expensive for the owner to drain it, or makes access to the lot more difficult, that is a result incidental to the improvement. But for a direct invasion of one's right of property, even though contemplated by or necessarily resulting from the plan adopted, an action will lie; otherwise it would be taking private property for public use without compensation. Thus, if, in cutting a street down to a grade the soil of an abutting lot is precipitated into the cut, or if, in filling up the grade, the slope of the embankment is made to rest on private property, that is a direct invasion of property rights which cannot be justified, even though the plan adopted contemplates or will necessarily produce the result."

tive and direct invasion of private property, as by collecting and throwing upon it to its damage water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. * * * It is impossible to answer the reasoning of these cases, especially where the injury complained of constitutes a taking. That making one's premises a place of deposit for the surplus waters in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, is an appropriation requiring compensation to be made, see *Weaver v. Mississippi & R. R. Boom Co.*, 28 Minn. 534." "There is a distinction between the rule as to the liability of a *quasi*-corporation on account

of the negligent action and non-feasance or trespasses of its officers in the nature of torts, and damages which are occasioned to an individual or his property by affirmative action by officers in supposed execution of a corporate power for a public purpose. In such cases, where the individual sustains a special injury, it may be said that his property has been taken or damaged for the public use, and compensation should have been made in the first instance, or the work which caused the injury should be abated as a nuisance." 1 Andrews' American Law, § 383. See, however, *Johnson v. Somerville*, 195 Mass. 370.

³² *Tate v. St. Paul*, 56 Minn. 527, at 529.

§ 350. The construction and care of sewers.—When the corporation ceases to act in a *quasi-judicial*, or, more properly, legislative capacity, in deciding on the plan of an improvement in the nature of sewers, and begins to act ministerially in actually constructing it, and afterward in caring for it, it is liable for damages caused by negligence, in the course of the work. The liability for damages caused by its neglect to exercise reasonable care in the construction³³ or maintenance of drains and sewers over which it has control³⁴ is recognized even in the states which impose no liability upon the corporation for want of care in the management of its highways.³⁵

The corporation is not required to exercise extraordinary care

³³ A city acts ministerially in the construction of a sewer. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562. See note to *Perry v. Worcester*, 66 Am. Dec. 434, 442.

³⁴ *Monticello v. Fox* (Ind. App.), 28 N. E. 1025; *Kosmak v. New York*, 117 N. Y. 361, 22 N. E. 945. See note, 66 Am. Dec. 436, where many cases are cited. As to liability when a sewer is in part on private property, see *Stoddard v. Saratoga Springs*, 127 N. Y. 261. In *Schroeder v. City of Baraboo*, 93 Wis. 95, 101, the court said: "It may be stated generally as the law that where private property is flooded by water and sewage, whether such property be on the grade of the street or below such grade, either by such water and sewage, after having been collected in such sewer or drain, escaping therefrom to such property by reason of the negligent construction of such drain or sewer, or want of proper repair of the same, or by negligent discontinuance thereof by closing up the outlet, the city is liable. Such is the doctrine of *Gilluly v. Madison*, 63 Wis. 518, and to the same effect are *Hitchins v. Frostburg*, 68 Md. 100; *Defer v.*

Detroit, 67 Mich. 346. And this is so though the sewer or drain be originally constructed wholly or in part only by private parties, if the municipality assumes the control and maintenance of it. *Taylor v. Austin*, 32 Minn. 247."

³⁵ *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; *Rowe v. Portsmouth*, 56 N. H. 291; *Winn v. Rutland*, 52 Vt. 481; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. In Massachusetts and the states which have followed its decisions, the liability for negligence of servants in the construction and management of sewers, rests upon the same ground as that in the construction and care of water systems, gas and electric light systems and the like; namely, that in maintaining such facilities for the use of private persons who wish to pay for them, the corporation is acting in a commercial undertaking. See review of Massachusetts law, *Hill v. Boston*, 122 Mass. 344; *Haley v. Boston*, 191 Mass. 291. See, further, *Weller v. St. Paul* (Minn.), 12 Am. St. 754, note; *Davis v. Crawfordsville*, 119 Ind. 1, 12 Am. St. 361, note; *Hazard v. Council Bluffs*, 79 Iowa,

to keep its sewers in proper condition.³⁶ It is liable only for negligence; which involves a lack of due care by its officers or servants in the performance of their work, or a failure on the part of the corporate authorities to remedy some evil after knowledge or an opportunity for knowledge, or a deliberate authorization of an injury by such authorities.³⁷

§ 351. Consequential damages.—That which the legislature legally authorizes cannot be wrongful. Hence, when a corporation acts within the limits of its power and jurisdiction and pursuant to a valid act of the legislature, and with reasonable care and skill, it is not responsible for consequential damages to private property or persons.³⁸ Thus, there is no liability for consequential injuries caused by establishing or changing the grade of streets.³⁹ The state has absolute control over the streets and highways, and all adjoining property is held subject to the condition that the grade may be changed. The reason for this rule is thus stated in a leading case: ⁴⁰ “Those who purchase house-lots bordering upon streets are supposed to calculate the chances of such elevations and reductions as the increasing population of a city may require in order to render the passage to and from the several parts of the city safe and convenient; and as their

106; *Judge v. Meriden*, 38 Conn. 90; *Gilluly v. Madison*, 63 Wis. 518; *Owens v. City of Lancaster*, 182 Pa. St. 257, 38 Atl. 858; *Blizard v. Danville*, 175 Pa. St. 479.

³⁶ *Netzer v. Crookston*, 59 Minn. 244.

³⁷ *Haus v. Bethlehem*, 134 Pa. St. 12, 19 Atl. 437; *Vanderslice v. Philadelphia*, 103 Pa. St. 102. A city must use reasonable care when it is constructing sewers to avoid injury to individuals. When the work is in the hands of a contractor the weight of authority is to the effect that the city as well as the contractor is liable for injuries caused by negligence regarding excavations in the streets; see *Welsh v. St. Louis*, 73 Mo. 71; but this, of course, is on the ground that the city cannot relieve itself from the

duty to maintain safe streets, by entrusting the care of them to another.

³⁸ *Dillon, Mun. Corp.*, II, § 987; *Callendar v. Marsh*, 1 Pick. (Mass.) 417; *Alexander v. Milwaukee*, 16 Wis. 264; *Terry v. Richmond*, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834; *Powell v. Wytheville*, 95 Va. 73, 27 S. E. 805.

³⁹ *Callendar v. Marsh*, 1 Pick. 417; *Green v. Reading*, 9 Watts (Pa.) 382; *Lee v. Minneapolis*, 22 Minn. 13; *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851. This rule is recognized in every state except Ohio. See *McCombs v. Akron Council*, 15 Ohio, 474; *Cohen v. Cleveland*, 43 Ohio St. 190.

⁴⁰ *Callendar v. Marsh*, 1 Pick. 417; *Northern Transportation Co. v. Chicago*, 99 U. S. 635.

purchase is always voluntary they may indemnify themselves in the price of the lot which they buy or take the chance of future improvements, as they see fit. They are presumed to foresee the changes which public necessity or convenience may require." The rule is the same although the property owner has constructed buildings with reference to such grade,⁴¹ and his access is entirely cut off. Changing the grade under such circumstances is not taking the property for public use.⁴² It has been said that a municipal corporation is liable for damages caused to private property by grading streets, "when a private owner of the soil over which the streets are laid, if improving it for his own use," would be liable.⁴³ On this principle an abutting owner can recover damages from a municipality for removing the natural support of his land.⁴⁴ But the prevailing rule is that there is no common law liability for damages, although the street is so graded as to cause the earth to fall in.⁴⁵ A remedy is now generally provided for by statute. In such cases it is exclusive of all other remedies.⁴⁶

⁴¹ *Henderson v. Minneapolis*, 32 Minn. 319. The power to make a grade and improve streets is a continuing power. *Karst v. St. Paul, etc. R. Co.*, 22 Minn. 118.

⁴² *Northern Transportation Co. v. Chicago*, 99 U. S. 635. See 2 Dillon, *Mun. Corp.* (4th ed.), § 995b. But when the constitution provides for compensation when property is taken or "damaged," there can be a recovery. See *Searle v. Lead*, 10 So. D. 312, 73 N. W. 101,

39 L. R. A. 345, note, and cases cited.

⁴³ *O'Brien v. St. Paul*, 25 Minn. 331; *Armstrong v. St. Paul*, 30 Minn. 299.

⁴⁴ *O'Brien v. St. Paul*, 25 Minn. 331; *Nichols v. Duluth*, 40 Minn. 389.

⁴⁵ See 2 Dillon, *Mun. Corp.* (4th ed.), § 990, note.

⁴⁶ *Heiser v. New York*, 104 N. Y. 68; *Cole v. Muscatine*, 14 Iowa 296.

CHAPTER XXIV.

ACTIONS AND PROCEEDINGS.

§ 352. The capacity to sue and be sued.	§ 357. <i>Quo warranto</i> .
353. Notice of claim.	358. Remedy in equity.
354. <i>Mandamus</i> .	359. <i>Certiorari</i> .
355. <i>Mandamus</i> to enforce duties toward creditors.	360. Levy of execution on corporate property.
356. Further illustrations of the use of <i>mandamus</i> .	361. Liability to garnishment.

§ 352. **The capacity to sue and be sued.**—The right to sue and be sued is a power incidental to all public corporations. A question has sometimes arisen in connection with *quasi*-corporations, but if any such body is technically a corporation it may sue and be sued in the same manner as a municipal corporation. The name in which actions shall be brought is governed by the charter. They are sometimes brought in the corporate name or in the name of the inhabitants, the mayor, the county commissioners or trustees. This must be determined by examination of the charter or laws of the state.¹

§ 353. **Notice of claim.**—Municipal charters generally provide that no action shall be maintained against the corporation unless a statement in writing signed by the person injured or claiming to be injured by the wrong and the circumstances thereof and the amount of damages claimed shall be presented to the proper officer within a designated time. As already stated, the words “claim or demand,” when used in such a statute, do not apply to a tort.² Under Wisconsin statutes, it was held that

¹ With reference to the right to sue a county, see *Ward v. Hartford County*, 12 Conn. 404; *Whittaker v. Tuolumne County*, 96 Cal. 100, 30 Pac. 1016. As to the right of county commissioners to sue, see *County of Tipton v. Kimberlin*, 108 Ind. 449, 9 N. E. 407. As to the right of a village to sue, see *Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931.

² § 204, *supra*.

an action to recover back illegal taxes paid under protest sounds in tort, although in legal fiction it is an action on an implied contract.³

§ 354. Mandamus.—The writ of *mandamus* will issue to a public corporation or its officers to compel the performance of a ministerial or mandatory duty clearly enjoined by law, when there is no other specific legal remedy adequate to enforce the rights of the relator or of the public.⁴ It is not as formerly a prerogative writ,⁵ but in modern practice “is nothing more than an action at law between the parties. * * * The right to the writ and the power to issue it has ceased to depend on any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It is a writ to which every one is entitled when it is the appropriate process for asserting the right he claims.”⁶ It will issue only where there is a clear legal right

³ *Flieth v. City of Wausau*, 93 Wis. 446; *Ruggles v. Fond du Lac*, 53 Wis. 436.

⁴ *State v. Whitesides*, 30 S. C. 579, 3 L. R. A. 777, annotated; *People v. Crotty*, 93 Ill. 180; *Baker v. Marshall*, 15 Minn. 177 (Gil. 136); *State v. Southern Minn. Ry. Co.*, 18 Minn. 40 (Gil. 21). In *Bassett v. Atwater*, 65 Conn. 355; 32 L. R. A. 575, Andrews, C. J., said: “*Mandamus*, although it is an extraordinary legal remedy, is in the nature of an equitable interference, supplementing the deficiencies of the common law. It will ordinarily be issued where a legal duty is established and no other sufficient means exists for enforcing it. When the object sought can be equally well obtained by other means, as by an action, or by some other form of proceeding, then *mandamus* will not lie. Thus, the enforcement of merely private obligations, such as those arising from contracts, are not within its scope.” *Mandamus*

cannot usurp the functions of an appeal or writ of error. *State v. Buhler*, 90 Mo. 560. It must be remembered that the writ of *mandamus* is regulated by statute in many states and that the tendency is toward extending its use. The writ may, under some statutes, be used whenever it will afford a proper and sufficient remedy, although there may be another specific remedy. See *People v. Commissioners of Highways*, 130 Ill. 482, 6 L. R. A. 161; *People v. Crotty*, *supra*.

⁵ See § 200, *supra*, note; High. Extr. Legal Rem., §§ 350, 606. But it is not a writ of right granted *ex debito justitiæ*, but of sound judicial discretion, to be granted or withheld according to circumstances.

⁶ Taney, C. J., in *Kentucky v. Dennison*, 24 How. (U. S.) 68, 97; *Illinois Central Ry. Co. v. People*, 143 Ill. 434, 19 L. R. A. 119.

in the relator,⁷ a corresponding duty in the defendant,⁸ and the want of any other adequate and sufficient legal remedy.⁹ It will therefore not issue to compel the performance of a duty which is doubtful or discretionary. Thus, it will not issue to a mayor to compel him to issue a license, when the issuance of such license is within his sound legal discretion.¹⁰ Judge Dillon says:¹¹ "If the inferior tribunal, corporate body or public agent or officer has a *discretion, and acts and exercises it*, this discretion cannot be controlled by *mandamus*; but if the inferior tribunal, body, officer or agents *refuse to act* in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a *mandamus* will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdic-

⁷ State v. McCabe, 74 Wis. 481, 43 N. W. 322; People v. State Board of Canvassers, 129 N. Y. 360, 14 L. R. A. 646; People v. Stevens, 5 Hill (N. Y.), 616; Phoenix Iron Co. v. Com., 113 Pa. St. 563.

⁸ Com. v. Pittsburgh, 34 Pa. St. 496.

⁹ State v. Whitesides, 30 S. C. 579, 3 L. R. A. 777; Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773; State v. Manitowoc, 52 Wis. 423; People v. Chenango County, 11 N. Y. 563; State v. Langlie, 5 N. Dak. 594, 32 L. R. A. 723. As to the existence of another specific remedy under the statute, see People v. Commissioners of Highways, 130 Ill. 482, 6 L. R. A. 161. An ordinary action at law against a county was held not a specific and adequate remedy to defeat a *mandamus* to compel a county treasurer to pay a warrant out of funds in his possession. Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773, with note on "*Mandamus* to compel payment of municipal debt by custodian of municipal funds." In State v. Ames, 31 Minn. 440, it was said that such a suit would be

neither speedy nor adequate. It has usually been held, however, that *mandamus* will not be allowed when suit will lie against the municipality. See Lexington v. Mullen, 7 Gray (Mass.), 280; State v. Bridgman, 8 Kan. 307; Sessions v. Boykin, 78 Ala. 328. But see People v. Mead, 24 N. Y. 114.

¹⁰ Sherlock v. Stuart, 96 Mich. 193, 21 L. R. A. 580; State v. Tippecanoe Co., 45 Ind. 501; Deehan v. Johnson, 141 Mass. 23. Compare Braconier v. Packard, 136 Mass. 50.

¹¹ Dillon, Mun. Corp. (4th ed.), § 832. As to the right to issue a *mandamus* to the governor and other state officers, see People v. Governor, 29 Mich. 320, note, 18 Am. Rep. 89; Rice v. Austin, 19 Minn. 103, 18 Am. Rep. 330; State v. Kirkwood, 14 Iowa, 162; State v. Stone, 120 Mo. 428, 23 L. R. A. 194; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564. The discretionary power of building bridges and making local improvements will not be controlled by *mandamus*. State v. Essex County, 23 N. J. L. 214.

tion, body, or officer.” Thus, a court cannot, by *mandamus*, compel another agency to act in favor of a party when the statute that governs that agency has invested it with discretion to do so or not, as it judges right; but, the court can, by *mandamus*, compel the agency to exercise the discretion reposed in it. For example, although the allowance of a claim rests in the discretion of an auditing board, a court will compel the board to hear the claim, and pass upon it.¹² The writ never lies to enforce private contracts.¹³

§ 355. **Mandamus to enforce duties toward creditors.**—*Mandamus* is the proper remedy to compel a public corporation to perform its legal duties toward its creditors.¹⁴ As a general rule, the writ will not issue when the creditor has a right to an execution and levy on the property of the corporation or of its citizens, unless the creditor, by virtue of special statutory provision, is entitled to the levy of a tax for the payment of his debt.¹⁵ In some states the writ will issue before the creditor has obtained judgment;¹⁶ but in the federal courts, when the creditor is not entitled to a specific tax, there must be a judgment and the return of an execution *nulla bona* before a writ of *mandamus* will issue.¹⁷ The writ is then in the nature of an execution¹⁸ and may be directed to the corporation or its officers, and its execution can-

¹² *Boyd v. Detroit Board of Health*, 140 Mich. 306; *Safford v. Detroit Board of Health*, 110 Mich. 81. Where a statute required city councils to enact ordinances to enforce provisions of the statute prohibiting stock from running at large, it was held that *mandamus* should be granted to compel a council to legislate on the matter. *Huey v. Waldrop*, 141 Ala. 818. *Mandamus* will issue to compel the granting of a permit, where the petitioner is absolutely entitled to it, even though the board which is to give the permit has authority to impose conditions in the same. *Cheney v. Barker*, 198 Mass. 356.

¹³ *Florida, etc. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419; *Parrott*

v. Bridgeport, 44 Conn. 180. See note, 3 L. R. A. 265.

¹⁴ *Meriwether v. Garrett*, 102 U. S. 472; *Baltimore v. Keeley Institute*, 81 Md. 106, 27 L. R. A. 647; *Thomas v. Mason*, 39 W. Va. 526, 26 L. R. A. 727.

¹⁵ *Knox County v. Aspinwall*, 24 How. (U. S.) 376.

¹⁶ *Com. v. Pittsburgh*, 34 Pa. St. 496; *Rahway Savings Institution v. Rahway*, 49 N. J. L. 384.

¹⁷ *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655; *Riggs v. Johnson County*, 3 Wall. (U. S.) 166; *State v. Manitowoc*, 52 Wis. 423.

¹⁸ *Howard v. City of Huron*, 5 S. Dak. 539, 26 L. R. A. 493.

not be interfered with by the state authorities.¹⁹ After judgment, *mandamus* and not a bill in equity is the proper remedy to compel the levy of a tax for the payment of the judgment.²⁰ Where the practice is to permit application for a *mandamus* to compel payment of the debt without requiring the creditor first to procure a judgment, the validity of the debt may be contested by the corporation in the proceedings for *mandamus*; ²¹ but where the creditor has reduced the debt to judgment, all original defenses are, of course, barred.²² But where the town authorities consented to a judgment in favor of certain bondholders, and it appeared that there was no authority to issue the bonds, *mandamus* to compel the levy of a tax to pay the judgment was refused.²³ The writ does not confer new authority,²⁴ and therefore a corporation can only be compelled to exert its legal powers. If it has no power to raise money by taxation, it cannot be compelled to levy a tax.²⁵

§ 356. Further illustrations of the use of *mandamus*.—Subject to the general rules stated in the preceding section, *mandamus* is the proper remedy, on the petition of the interested party, to compel the payment of the salary of an official,²⁶ the levy of an assessment as directed by the charter,²⁷ the issue of bonds to pay for a public improvement,²⁸ the completion of a

¹⁹ *Riggs v. Johnson Co.*, 6 Wall. 166; *Supervisors v. Rogers*, 7 Wall. (U. S.) 175. The effect of resignation of the officers to be proceeded against is considered in *Rees v. Watertown*, 19 Wall. 107; *Badger v. United States*, 93 U. S. 599; *Amy v. Watertown*, 130 U. S. 301; *Leavenworth County Commissioners v. Sellew*, 99 U. S. 624; 2 Dillon, Mun. Corp. (4th ed.), § 861.

²⁰ *Louisiana v. Police Jury*, 111 U. S. 716; *Rock Island County v. United States*, 4 Wall. (U. S.) 435.

²¹ *Sherwood v. Ryneerson*, 141 Mich. 92.

²² *Howard v. Huron*, 5 S. D. 539, 26 L. R. A. 493.

²³ *Union Bank v. Com'rs of Oxford*, 119 N. C. 214. The court held the consent *ultra vires*.

²⁴ *Rosenthal v. Board of Canvasers*, 50 Kan. 129, 19 L. R. A. 157; *State v. Secrest*, 33 Minn. 381. *Mandamus* will not be allowed to compel the performance of an act for the purpose of accomplishing an illegal end. *State v. Hill*, 32 Minn. 275.

²⁵ *Brownville v. Loague*, 129 U. S. 493; *United States v. Macon County Court*, 99 U. S. 582. An officer will not be compelled to perform an act which is outside of his authority. *State v. Hill*, *supra*.

²⁶ *Baker v. Johnson*, 41 Me. 15.

²⁷ *Reock v. Newark*, 33 N. J. L. 129.

²⁸ *People v. Flagg*, 46 N. Y. 401. See *People v. Batchellor*, 35 N. Y. 128, 13 Am. Rep. 480.

public improvement,²⁹ the admission to an office,³⁰ the restoration of an officer wrongfully removed or suspended,³¹ the holding of an election as required by law³² or according to the method prescribed by a particular statute,³³ the holding by a municipal council of a meeting and the election of an officer as required by the charter,³⁴ a board to meet and canvass votes,³⁵ a canvassing board to omit certain illegal ballots,³⁶ officers to turn over funds actually in their possession,³⁷ to call a new election where the prior election was inoperative,³⁸ to compel the acceptance of an

²⁹ *People v. Brooklyn Council*, 22 Barb. (N. Y.) 404.

³⁰ *State v. Rahway*, 33 N. J. L. 111; *Ellison v. Raleigh*, 89 N. C. 125. But in some states it has been said broadly that *mandamus* is not the proper remedy to try title to an office. See *People v. Detroit*, 18 Mich. 338; *Biggs v. McBride*, 17 Oreg. 640, 5 L. R. A. 115. But the more exact statement would seem to be that the remedy cannot be used to determine title between two claimants as a collateral issue. *State v. Atlantic City*, 52 N. J. L. 332, 8 L. R. A. 697; note to *Fleming v. Guthrie*, in 3 L. R. A. 57. In *Harwood v. Marshall*, 9 Md. 83, it was held that *mandamus* was the proper remedy to try the title to an office, even though filled *de facto*, when, by reason of the delay incident to the remedy by *quo warranto*, relief by that remedy would be ineffectual. In Massachusetts a still more liberal rule obtains. *Keough v. Holyoke*, 156 Mass. 403; *Luce v. Dukes Co.*, 153 Mass. 108. See 2 Dillon, *Mun. Corp.* (4th ed.), § 846.

³¹ *State v. Jersey City*, 25 N. J. L. 536. *Mandamus* is not the proper remedy to restore to office a person who has been wrongfully removed and whose successor has been elected and has entered upon the duties of the office. *People v.*

New York Infants' Asylum, 122 N. Y. 190, 10 L. R. A. 381.

³² *People v. Fairbury*, 51 Ill. 149.

³³ *State v. Wrightson*, 56 N. J. L. 126, 22 L. R. A. 548.

³⁴ *Lamb v. Lynd*, 44 Pa. St. 336.

³⁵ *Rosenthal v. State Board of Canvassers*, 50 Kan. 129, 19 L. R. A. 157. To compel the board to disregard certain returns which, although regular on their face, are admittedly the result of an illegal canvass. *People v. Rice*, 129 N. Y. 449, 14 L. R. A. 643, note. But not to count ballots which have passed beyond their control. *State v. Waggoner*, 34 Neb. 116, 15 L. R. A. 740. It will not issue to compel a board to count ballots according to the provision of an unconstitutional statute. *Maynard v. Board of District Canvassers*, 84 Mich. 298, 11 L. R. A. 332.

³⁶ *People v. Board of County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624.

³⁷ But *mandamus* will not issue to compel what cannot be done. Hence, if an officer has wrongfully put it out of his power to turn over funds, there is no remedy by *mandamus*. *Duval County Commissioners v. Jacksonville*, 36 Fla. 196, 29 L. R. A. 416.

³⁸ *State v. South Kingston*, 18 R. I. 258, 22 L. R. A. 65.

office,³⁹ the payment of a warrant by the county treasurer,⁴⁰ to proceed in a legal manner and divide a county,⁴¹ to compel a board of supervisors to include certain items in estimates of expenses of the county for the current year,⁴² to compel highway commissioners to remove a certain fence from across a public highway when the facts which render the existence of the fence illegal are conceded,⁴³ the issue of warrants in payment of referee's fees,⁴⁴ the delivery of the office room, books and records of an office to a public officer,⁴⁵ to compel a member of a board to meet with the other members and elect an officer,⁴⁶ to compel county officers to hold their office at the legal county seat,⁴⁷ or to compel a mayor to recognize a person as a member of the city council.⁴⁸ But *mandamus* will not issue to compel a county treas-

³⁹ People v. Williams, 145 Ill. 573, 24 L. R. A. 492, annotated.

⁴⁰ Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773.

⁴¹ People v. Broom, 138 N. Y. 95, 20 L. R. A. 81.

⁴² State v. Robinson, 35 Neb. 401, 17 L. R. A. 383.

⁴³ Brokaw v. Bloomington Township Commissioners, 130 Ill. 482, 6 L. R. A. 161, annotated.

⁴⁴ Guthrie v. Territory, 1 Okla. 188, 21 L. R. A. 841.

⁴⁵ To defeat a *mandamus* in such a case it must appear that the incumbent has a colorable title and is in possession under a claim of right. Stevens v. Carter, 27 Oreg. 553, 35 L. R. A. 343. But see decisions to the effect that the court will award *mandamus* in such cases to put the petitioner in possession of the things pertaining to the office if he shows a *prima facie* title, leaving the title to be finally litigated in other proceedings. State v. Johnson, 35 Fla. 2, 35 L. R. A. 357. See elaborate note in 35 L. R. A. 343, on "*Mandamus* to compel surrender of office." State v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116; State v. Churchill, 15 Minn.

455 (Gil. 369); Merrill, *Mandamus*, § 142. But the writ will be denied when it will become necessary first to determine the title of the *de facto* incumbent. State v. Williams, 25 Minn. 340.

⁴⁶ Statutes which specify a time within which a public officer is to perform an official act regarding the rights and duties of others are generally directory. Thus, where the law requires that township trustees shall meet on a certain day and elect a county superintendent, and they are unable to act for want of a quorum, an absent member will be required by *mandamus* to attend at a later date. Wampler v. State, 148 Ind. 557, 38 L. R. A. 829; State v. Smith, 22 Minn. 218. See as to compelling attendance of individual members, People v. Whipple, 41 Mich. 548.

⁴⁷ State v. Langlie, 5 N. Dak. 594, 32 L. R. A. 723. The proceedings were to determine whether the county seat had been legally changed.

⁴⁸ Swindell v. State, 143 Ind. 153, 35 L. R. A. 50. See Lawrence v. Ingersoll, 88 Tenn. 52, 6 L. R. A. 308.

urer to certify that all taxes are paid when certain illegal taxes remain unpaid,⁴⁹ or to compel township trustees to sign bonds issued and placed in the hands of a third person and afterwards held to have been issued under an unconstitutional statute.⁵⁰

§ 357. *Quo warranto*.—*Quo warranto* is the proper proceeding by which to determine whether a public power, office, privilege, or franchise is being held or exercised without authority.⁵¹ When a person is in possession of an office under color of right, the validity of his title can in general be tested only on an information in the nature of a *quo warranto*.⁵² In this proceeding the court may usually go behind the certificate of election, or commission, and inquire into the validity of the election or appointment.⁵³ It is the proper writ by which to test the right of a person to preside over a meeting of a municipal body⁵⁴ or the right to a seat in the city council.⁵⁵ It is generally held in this country that the question whether a public corporation has been legally created can be tested in a proceeding of this nature brought against one exercising an office in the corporation.⁵⁶ If it appears in such a proceeding that no corporation either *de jure* or *de facto* exists, the relator is entitled to judgment.⁵⁷

Under the English practice, the information for usurping a

⁴⁹ State v. Nelson, 41 Minn. 25, 4 L. R. A. 300.

⁵⁰ State v. Whitesides, 30 S. C. 579, 3 L. R. A. 777. See further, as to the use of *mandamus*, Smith v. Boston, 1 Gray, 72; People v. McCormick, 106 Ill. 184; Hill v. Goodwin, 56 N. H. 441; Milburn v. Glynn Co., 112 Ga. 160; Johnston v. Mitchell, 120 Mich. 589; Taylor v. Kolb, 100 Ala. 603.

⁵¹ It was originally a prerogative writ, but the tendency is to reduce it to the position of an ordinary action. It does not, however, issue as a matter of course, as it is an extraordinary remedy.

⁵² § 186, *supra*; State v. Sullivan, 45 Minn. 309, 11 L. R. A. 272; State v. Bulkeley, 61 Conn. 287, 14 L. R. A. 657; People v. Londoner, 13 Colo. 303, 6 L. R. A. 444.

⁵³ People v. Thatcher, 55 N. Y. 525.

⁵⁴ Cochran v. McCleary, 22 Iowa, 75.

⁵⁵ Com. v. Meeser, 44 Pa. St. 341.

⁵⁶ People v. Carpenter, 24 N. Y. 86; State v. Parker, 25 Minn. 215; People v. Bruennemer, 168 Ill. 482, 48 N. E. 43. In England the information is refused when it appears that no corporation exists. The leading case is Rex v. Saunders, 3 East, 119.

⁵⁷ But, at least where the proceeding is against the governing body or a charter officer, the existence of the corporation *de jure* is directly in issue. See, however, State v. Weatherby, 45 Mo. 17; State v. McReynolds, 61 Mo. 203.

special franchise by a corporation must be brought against the corporation; but for usurping a franchise to be a corporation it must be against the persons usurping it.⁵⁸ Particular statutes sometimes alter the rule in this country in the case of municipal corporations,⁵⁹ but otherwise the proper practice seems to be to test the existence of the corporation by proceeding against it in its corporate name, rather than against individuals composing it.⁶⁰

The proceeding to arrest the usurpation of a franchise rests in the sound discretion of the attorney-general⁶¹ of the state, and the granting of the writ rests in the sound discretion of the court or judge.⁶² The following rules have been stated as those which should guide in the issuance of this writ:⁶³ First, the relator must not be a mere stranger coming in to disturb a corporation with which he has no concern. Second, he must not have concurred in the act of which he now complains as illegal. Third, unless there is fraud or intentional violation of law, it must appear that public or private interests will not be seriously affected by the ouster of the incumbent.

⁵⁸ *People v. Richardson*, 4 Cow. (N. Y.) 97, 109, note. Proceedings in the nature of *quo warranto*, for the purpose of restraining a corporation from an unlawful exercise of franchises, must be against the corporation, and not merely against the officers and agents. *State v. Somerby*, 42 Minn. 55.

⁵⁹ *State v. Cincinnati, etc. Gas Co.*, 18 Ohio St. 262. An association, although not incorporated, may be ousted by *quo warranto* from acting "as a corporation." *State v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298.

⁶⁰ It has been held that the relator, by making a corporation a defendant under its corporate name, estops himself to deny its existence. *People v. Spring Valley*, 129 Ill. 169. But the weight of authority is *contra*. *State v.*

Tracy, 48 Minn. 497; *People v. K. & M. T. R. Co.*, 23 Wend. 193; *People v. Clark*, 70 N. Y. 518; *State v. Comm'rs*, 50 N. J. L. 457, 14 Atl. 560.

⁶¹ *Robinson v. Jones*, 14 Fla. 256. It must be prosecuted by, and not merely with the consent of, the attorney-general when the object is to test the right of a corporation to exercise a franchise. *State v. Tracy*, 48 Minn. 497, 51 N. W. 613. It will issue, however, without the consent of the attorney-general when the private person has an interest in himself distinct from that of the public, as a right to an office. *In re Barnum*, 27 Minn. 466.

⁶² *People v. Waite*, 70 Ill. 25.

⁶³ *Depue, J.*, in *State v. Tolon*, 33 N. J. L. 195, quoted in *Dillon, Mun. Corp.*, II, § 901.

§ 358. **Remedy in equity.**—Before a court of equity will use its powers by injunction to prevent a public corporation from exceeding or abusing its powers, it must be made to appear that the case falls within one of the recognized heads of equity jurisprudence, such as fraud, irreparable injury, want of an adequate remedy at law or the prevention of a multiplicity of suits.⁶⁴ There appears to be a tendency, however, to extend this jurisdiction,⁶⁵ and it is well settled that a court should compel a corporation to perform all its duties in reference to property which it holds in trust.⁶⁶

Suits to prevent public corporations from exceeding their authority, or to have their illegal acts set aside or corrected, are properly brought in the name of the attorney-general of the state, or in the name of the state on the relation of some interested person.⁶⁷ In some states, on the theory that a taxpayer has an interest in the disbursement of the funds of the corporation sufficient to give him a standing in equity, and in others by statutory provision, taxpayers may maintain a bill in equity, on behalf of themselves and other taxpayers, to prevent the corporation from acting *ultra vires*, or from disposing without authority of the property of the corporation, or creating without authority a debt which the taxpayers will be called upon to pay.⁶⁸ In New York, it was held that a citizen or taxpayer could not maintain

⁶⁴ *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Haywood v. Buffalo*, 14 N. Y. 534; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 424. The writ of prohibition is sometimes used to restrain the imposition of illegal fines and penalties. An injunction is directed to an individual and a writ of prohibition to an inferior court. *Smith v. Whitney*, 116 U. S. 167; *Bluffton v. Silver*, 63 Ind. 262. It will not issue when there is a remedy by appeal or *certiorari*. *State v. Withrow*, 108 Mo. 1; *Turner v. Forsyth*, 78 Ga. 683.

⁶⁵ 2 Dillon, *Mun. Corp.* (4th ed.), § 908. A public corporation may also be indicted for nonfeasance or misfeasance in the performance of

public duties imposed by law. *McClain*, *Crim. Law*, I, § 183 and cases cited.

⁶⁶ *Attorney-General v. Boston*, 123 Mass. 460.

⁶⁷ *State v. Saline County*, 51 Mo. 350, 11 Am. Rep. 454; *Attorney-General v. Detroit*, 26 Mich. 262. In *People v. Field*, 58 N. Y. 491 (*Tweed cases*), it was held that an action to recover money illegally taken from the city of New York could not be maintained in the name of the attorney-general of the state.

⁶⁸ *Crampton v. Zabriskie*, 101 U. S. 601; *New London v. Brainard*, 22 Conn. 552; *The Liberty Bell*, 23 Fed. 843; *Baltimore v. Gill*, 31 Md. 375. As to the right to en-

a suit to restrain or avoid a corporate act alleged to be illegal, unless he was able to show that he would suffer some damage special and peculiar to himself, distinct from that of other inhabitants.⁶⁹ But every taxable inhabitant, and perhaps every inhabitant, says Judge Dillon,⁷⁰ has such an interest to prevent or avoid illegal or unauthorized corporate acts that he may be a relator on whose application the proper public officer may, on behalf of the public, file the requisite bill in cases which fall within the jurisdiction of equity, to enjoin the menaced wrong; or, if it has been consummated, to relieve against it. A court of equity will, at the suit of one or more taxpayers, enjoin a municipality from collecting an illegal tax on real property.⁷¹ The mere fact that the sale would create a cloud on the title is sufficient to confer jurisdiction upon the court.⁷² The court will not generally interfere to prevent the collection of an illegal tax on personal property,⁷³ and will never interfere where the tax is merely irregular.⁷⁴

§ 359. Certiorari.—The writ of *certiorari* lies to inferior courts and officers exercising power of a judicial nature to review judicial proceedings when no right of appeal or other specific mode of review is provided.⁷⁵ It is a common-law remedy and

join a threatened misapplication of funds, see *Place v. Providence*, 12 R. I. 1; *Newmeyer v. Missouri, etc. Ry. Co.*, 52 Mo. 81, 14 Am. Rep. 394, note.

⁶⁹ *Doolittle v. Broome County*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 N. Y. 318. The right to bring such an action is established in New York by statute. Code Civ. Proc. § 1925. See *Kingsley v. Bowman*, 53 N. Y. Supp. 426; *Feeley v. Wurster*, 25 Misc. 544, 54 N. Y. Supp. 1060.

⁷⁰ 2 Dillon, *Mun. Corp.* (4th ed.), § 921; *Chicago v. Union Building Ass'n*, 102 Ill. 379.

⁷¹ *Dows v. Chicago*, 11 Wall. (U. S.) 108; *State Railway Tax Cases*, 92 U. S. 575.

⁷² *Holland v. Baltimore*, 11 Md. 186. It is considered that there is

an adequate remedy at law in the case of personal property. *Dodd v. Hartford*, 25 Conn. 231; *Youngblood v. Sexton*, 32 Mich. 406, 2 Am. Rep. 65; *Milwaukee v. Koeffler*, 116 U. S. 219. But there are exceptions to this rule. See *Allen v. Baltimore & Ohio Ry. Co.*, 114 U. S. 311.

⁷³ *Milwaukee v. Koeffler*, 116 U. S. 219.

⁷⁴ *Stone v. Mobile*, 57 Ala. 61.

⁷⁵ *In re Wilson*, 32 Minn. 145; *State v. St. Paul*, 34 Minn. 250; *Attorney-General v. Northampton*, 143 Mass. 589; *State v. The Judge, etc.*, 42 La. Ann. 1089, 10 L. R. A. 248; *Tomlinson v. Board of Equalization*, 88 Tenn. 1, 6 L. R. A. 207; *State v. Hughes County*, 1 S. D. 292, 10 L. R. A. 588. It must be remembered that the use of this

exists in such cases, although not provided for by statute.⁷⁶ Its application, however, has in some cases been extended beyond its proper function at common law by statute and judicial decision. The other remedy referred to in such a statute has been held to be one which will enable the relator to have the proceedings complained of annulled as void and as not including a mere right to sue an officer acting under the void order.⁷⁷ The proceedings of a public corporation, so far as they are of a judicial nature, may be reviewed and errors of law corrected by *certiorari*,⁷⁸ but it is not a substitute for an appeal where appeal is otherwise provided for; and does not take up the case, unless aided by statute, for the purpose of correcting errors of fact.⁷⁹ Thus, the legality of convictions in municipal courts,⁸⁰ of local assessments⁸¹ or the opening of a street⁸² may be thus determined when no other mode of review is provided by law. The common-law rule that only judicial acts can be reviewed under the writ has been somewhat relaxed by some of our courts, and it has been used to test the acts of municipal corporations, whether judicial or legislative.⁸³

§ 360. Levy of execution on corporate property.—The nature of the powers conferred upon public corporations requires that they shall not be subject to the ordinary remedies provided

writ is regulated by statute in many states. The writ of *certiorari* will not be granted for the purpose of reviewing nugatory proceedings. *State v. Village of Lambertson*, 37 Minn. 362. For a history of the writ of *certiorari*, see an article by Prof. Goodnow, "The Writ of *Certiorari*," *Pol. Sci. Quar.*, VI, 492.

⁷⁶ *People v. New York*, 2 Hill (N. Y.), 9.

⁷⁷ *State ex rel. v. Rose*, 4 N. D. 319, 26 L. R. A. 593.

⁷⁸ *Collins v. Davis*, 57 Iowa, 256; *Oshkosh v. State*, 59 Wis. 425; *Jackson v. Michigan*, 9 Mich. 111.

⁷⁹ *State v. Bill*, 13 Ired. (N. C.) L. 373.

⁸⁰ *Taylor v. Americus*, 39 Ga. 59.

⁸¹ *State v. Newark*, 25 N. J. L. 399.

⁸² *Dwight v. Springfield*, 4 Gray, 107.

⁸³ *Camden v. Mulford*, 26 N. J. L. 49. On *certiorari* the evidence returned may be considered only for the purpose of determining whether it will justify the finding—not whether the superior court would have reached the same conclusion. *Jackson v. People*, 9 Mich. 111. The proceedings of a board of health condemning a nuisance are not reviewable when the board is not required to take evidence, but may act upon its own inspection. *People v. Yonkers Board of Health*, 140 N. Y. 1, 23 L. R. A. 481.

for the collection of debts against individuals. In order that they may properly provide for the local government of the community, it is essential that the property held for public uses shall be exempt from execution. Hence, on grounds of public policy, it is held that neither the property, the revenues raised by taxation or by fines and penalties, nor tax judgments can be seized under execution upon a judgment against the corporation.⁸⁴

§ 361. Liability to garnishment.—On grounds of policy, public corporations are generally held not liable to garnishment with respect to their revenues, their debts, or the salaries of their officials. In some states this rule has been established on principle,⁸⁵ in others the exemption is based upon construction of particular statutory provisions,⁸⁶ and in some states garnishment is allowed in many cases.⁸⁷ An officer cannot subject the funds of a municipality to garnishment in a suit to collect his salary from the corporation.⁸⁸ Nor by the general rule can a city be garnished by a creditor of one of its officers or employees.⁸⁹ An officer's salary, when not exempt on other grounds, may some-

⁸⁴ See, *supra*, § 82.

⁸⁵ *Burnham v. Fond du Lac*, 15 Wis. 211; *Merrell v. Campbell*, 49 Wis. 535; *Erie v. Knapp*, 29 Pa. St. 173; *Roeller v. Ames*, 33 Minn. 132; *Merwin v. Chicago*, 45 Ill. 133; *Bireus v. Harper*, 59 Ill. 21; *Droz v. Baton Rouge*, 36 La. Ann. 340; *State v. Eberly*, 12 Neb. 616; 1 Dillon, Mun. Corp. (4th ed.), § 101; *McDougall v. Hennepin Co.*, 4 Minn. 184 (Gil. —); *Underhill v. Calhoun*, 63 Ala. 216. See note to 24 Am. St. 73. The conflicting authorities are reviewed in Drake on Attachment (7th ed.), § 516. Garnishment of taxes due from an individual. *Egerton v. Third Municipality*, 1 La. Ann. 435. A city may waive its exemption by appearing. *Clapp v. Davis*, 25 Iowa, 315.

⁸⁶ As in Iowa. See *Jenks v. Township*, 45 Iowa, 554.

⁸⁷ (Debt due from a town) *Whidden v. Drake*, 5 N. H. 13; (salary

of officer due from a city) *Newark v. Funk*, 15 Ohio St. 462; (debt due to a town) *Bray v. Wallingford*, 20 Conn. 416; (debt due from a school district) *Seymour v. School District*, 53 Conn. 502; (same; county) *Adams v. Tyler*, 121 Mass. 380; (same; a city) *Laredo v. Nalle*, 65 Tex. 359.

⁸⁸ *Baltimore v. Root*, 8 Md. 95. In *Waterbury v. Commissioners*, 10 Mont. 515, 24 Am. St. 67, it is held that a county is liable to garnishment for a debt due by it to its officers, under a statute declaring that all "persons." To the same effect, *Newark v. Funk*, 15 Ohio St. 462.

⁸⁹ *School District v. Gage*, 39 Mich. 484; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *Clark v. Mobile*, 36 Ala. 621 (salary of teacher); *Roeller v. Ames*, 33 Minn. 132 (mayor); *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep.

times be reached by proceedings supplemental to execution.⁹⁰ So a judgment debtor may, under some forms of remedy on execution, be ordered to assign to his creditor a debt due him from a municipality.⁹¹ Where the corporation is sought to be held as garnishee, there is some reason for holding that it should not be required to become involved in the controversy.⁹² But when the corporation is the principal debtor, there seems to be no sufficient reason why its creditors should be deprived of the remedy which the law gives to the creditors of natural persons and private corporations.

276; *Bank v. Dibrell*, 3 Sneed (Tenn.), 379. *Contra*, *Rodman v. Musselman*, 12 Bush (Ky.), 354, 23 Am. Rep. 724. By statute salary of policeman is subject to garnishment. *City Council v. Van Dorn*, 41 Ala. 505.

⁹⁰ *Roeller v. Ames*, 33 Minn. 132.

⁹¹ *Knight v. Nash*, 22 Minn. 456.

⁹² And the majority of the decisions seem to be in accord with this rule. A city is not subject to garnishment for an ordinary debt due from it to a third person. Cases cited, *supra*.

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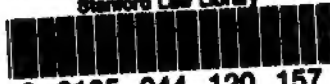
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